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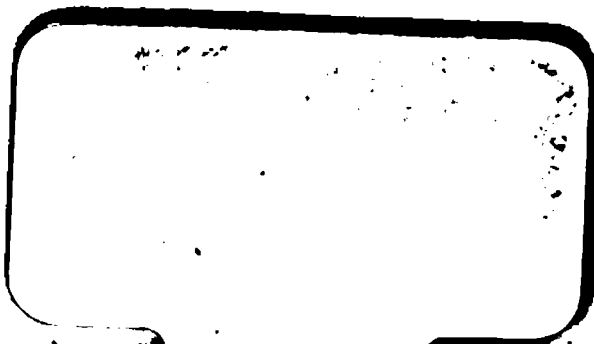
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REPORTS
OF
CASES ARGUED AND ADJUDGED
IN THE
Supreme Court of Florida,
AT
TERMS HELD IN 1860-'1

By JOHN B. GALBRAITH, Reporter.

VOLUME IX.

TALLAHASSEE
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Decisions
OF THE
Supreme Court of Florida,
AT TERMS HELD IN 1860

CRAVEN KITROL, PLAINTIFF IN ERROR, VS. THE STATE.

1. The Grand Jury must consist of men possessing the qualifications prescribed by statute, and one incompetent Grand Juror will render an indictment void and of no effect :*Provided* exception thereto is taken before issue joined and trial on said indictment.
2. If a disqualified or incompetent person is returned upon the Grand Jury, he may be challenged by the prisoner before the bill is presented. Or after the finding, the defendant may plead it in avoidance.
3. Under the provisions of the statute of this State, a person *over sixty years* of age is not a competent Grand Juror.
4. Where a Grand Juror is asked by the Court, in common with all the persons drawn as Grand Jurors, whether he is over sixty years of age, and remains silent and takes the oath of a Grand Juror, it is an acknowledgment he is under sixty years of age, and he will be so considered until the contrary is clearly established by evidence.

This case was decided at Marianna.

Appeal from Holmes' Circuit Court.

The opinion of the Court contains a full statement of the facts, to which reference is made.

A. H. Bush, for plaintiff in error, cited 1 Chitty's Crim. Law, 307, 308; Rawls vs. The State, 8 S. & M., 599, 609;

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McQuillen vs. The State, do., 587, 597; Barry vs. The State, 12 S. & M., 68; The State vs. Middleton, 5 Porter, 484; 1 Black., 387; 2 Black., 475; 1 Burr's Trial, 37.

W. D. Barnes, for Attorney General, for the State.

FORWARD, J., delivered the opinion of the Court.

The plaintiff in error was indicted at the Spring Term, 1858, under the act of January 6, 1855, entitled "*An Act to prevent white persons from gaming with negroes or other persons of color.*"

To this indictment preferred by the Grand Jury of Holmes county, the accused pleaded in abatement:

"That Thomas Andrews, one of the jurors forming said Grand Jury, was at the time of the holding of said Spring Term, A. D. 1858, of said county Circuit Court, and before then, over the age of sixty years."

To this plea the Solicitor replied that the juror named was not over sixty years of age, and that if he was, it was no *disqualification* of him as such juror.

Upon this issue upon the plea of abatement it appears by the record that the accused, to maintain the issue, introduced the following witnesses, who deposed as follows viz:

"David Andrews being duly sworn, says that he is a son of Thomas Andrews, who served as a Grand Juror at Spring Term, 1858, of this court; his father died on or about the 17th of June, A. D. 1858; does not know his father's age; heard his father say that he was born in 1795 or 1805, his father did not know which, the family record having been destroyed; from what he heard his father say, and from his appearance, thinks he was over the age of sixty when he served; has seen persons younger than his father look older."

"Robert R. Golden said that he heard Thomas Andrews, deceased, a few months before court, complain of his having

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to serve on the Jury, and then told witness he was sixty odd years old; did not know exactly how old; thought he was sixty-seven; witness was tax collector of his county in 1853; the said Andrews refused to give in his poll tax because he was over fifty; said he had been off the tax list several years before then."

"W. L. Jamison knew Thomas Andrews; sat up one night with him in his last illness, and heard him say to one of his sons that he had lived to be over sixty years; did not say how much."

On the part of the prosecution, it appears by the bill of exceptions:

"That the juror, Thomas Andrews, as well as his fellows, was asked if he was under the age of (60) sixty years, which question was propounded to the whole panel, and the jurors requested to make it known to the Court if any of them were of the age of sixty years or over, and that said Andrews did not say he was sixty years of age or over said age; whereupon he was sworn as a Grand Juror for said county."

Upon this testimony the Court overruled the plea in abatement, and the accused being put upon his trial, pleaded not guilty, and upon a trial was convicted, and the Court assessed the punishment to a fine of one hundred dollars.

Afterwards the defendant moved for a new trial, which was denied by the Court, from to the plaintiff in error excepted and prays bill of exceptions.

The only error assigned is, that the Court erred in giving judgment against the plaintiff in error on the plea in abatement.

It is contended by counsel for plaintiff in error that if the said juror was over sixty years of age that he was not a competent juror, and that the plea ought to have been sustained.

By the statute of this State, fixing the qualifications of jurors, it is provided that

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“The free white male citizens of the United States, who are householders, inhabitants and residents of this State, above the age of twenty-one years and under sixty years, shall be liable to serve, and are hereby *made competent* jurors for the trial of criminals within this State, and in the trial of civil causes for the recovery of debts and damages to any amount whatever.”

And in a subsequent act, passed in 1846, it is enacted that—

“No person under the age of twenty-one years, or above *the age of sixty*, nor any person continually sick, nor any habitual drunkard, *shall be summoned* on the jury.”

The first question to be considered is whether one incompetent Grand Juror will make an indictment void and of no effect?

In 1st volume of Chitty's Criminal Law, page 309, it is stated:

“This necessity for the grand inquest to consist of men free from all objection existed *at common law*, and was affirmed by the statute 11 Hen. 4, c. 9, which enacts that any indictment taken by a jury, one of whom is unqualified, shall be altogether void and of no effect whatsoever.”

It is said by Hawkins, Pleas of the Crown, Book. 2, ch. 25, sec. 28, that if any one of the grand jury who find an indictment be within any one of the exceptions in the statute, he vitiates the whole, though ever so many unexceptionable persons joined with him in finding it.”

12 Smedes & Marshall, 69. See also Barney vs. The State of Mississippi.

These authorities are conclusive that one incompetent Grand Juror renders the indictment void and of no effect whatsoever, if exception thereto is taken by the defendant at the proper time and in the regular manner.

The next inquiry is, at what time this exception should be taken, and how should it be presented to the Court?

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By reference again to Chitty's Criminal Law, we find it laid down: "If a man who is disqualified be returned, he may be challenged by the prisoner before a bill is presented, or if it be discovered after the finding the defendant may plead it in avoidance." It is clear that a defendant before issue joined may plead the objection.

In *McQuillen vs. the State of Mississippi*, 8 Smedes & Marshall, page 597, the Supreme Court of that State say:

"A person who is in Court, and against whom an indictment is about to be preferred, may undoubtedly challenge for cause. This is not questioned. But the Grand Jury may find an indictment against a person who is not in Court. How is he to avail himself of a defective organization of the Grand Jury? If he cannot do it by plea, he cannot do it in any way, and the law works unequally by allowing one class of persons to object to the competency of the Grand Jury, whilst another class has no such privilege. This cannot be. The law furnishes the same security to all, and the same principle which gives to a person in Court the right of challenge, gives to one who is not in Court the right to accomplish the same end by plea." See also *Commonwealth vs. Parker*, 2 Pickering, 550; *Commonwealth vs. St. Clair*, 1 Grattan, 556.

We are therefore of the opinion that the incompetency of the Grand Jurors by whom indictment is preferred may be pleaded by the defendant in abatement.

This brings us now to consider whether under the provisions of our statute, a juror over sixty years of age is a competent Grand Juror?

It is contended by acting Attorney General that our statute in this respect is directory and not peremptory, and leaves it a question of privilege with the juror, and if over sixty he is *exempt and not liable*.

Such a ruling has been made both in England and Amer-

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ica, but we apprehend it was thus adjudicated upon statutory provisions different from ours.

By reference to the statute above cited it will be seen that our Legislature, in fixing the qualifications of jurors, says: He must be a free white male citizen of the United States; he must, in addition thereto, be a householder; he must be an inhabitant; he must be a resident of this State; he must be above the age of twenty-one years, and he must be under sixty years. Such persons, says the statute, "*are hereby made competent jurors.*"

These provisions of qualification it appears to us are undeniable.

Suppose a person called who is possessed of all the above qualifications excepting he was not a *householder*, would it be contended that he was a competent juror? The answer is, the statute requires he should be a householder.

So when a juror is empanelled who is *over* sixty years of age, and is possessed of all the other qualifications, he is not a competent juror. And why not? Because the statute says he shall be "*under sixty years.*"

Had the statute ended where it says "*shall be liable to serve,*" then we might with propriety say, the statute leaves it a question of privilege with the juror; but the statute goes further; it declares that such persons are *competent* jurors, &c. It follows that if such persons are competent, others not possessed of such qualifications are not competent.

It was evidently the intention of the Legislature to secure, for the protection of the citizen whose rights might be affected, a Grand Jury composed of members possessing certain qualifications, *defined by the law*. In giving this statute such a construction we carry out that intention. We are therefore of the opinion that a person *over sixty years* of age is not, under the statute, a *competent* Grand Juror.

The Court below took testimony on the plea in abatement, on the inquiry whether the said juror was in truth over sixty

Haviland, Clark & Co. vs. Robert B. Hargis.—Opinion of Court.

years of age at the finding of said indictment, and upon hearing the testimony decided that fact was not established.

We see no reason for reversing the decision in this respect. The testimony in support of the affirmative consists, as will be seen by reference to it, of vague and uncertain declarations of the juror made both before and after the finding of the bill of indictment. The juror did not seem to know how old he was himself.

When called upon for his "poll tax," he was over age; but when asked by the court, when about to be sworn as a Grand Juror, whether he was over sixty years of age, made no reply, but afterwards took the oath of a Grand Juror, thus solemnly acknowledging he was under that age.

There being testimony on both sides of the issue, and the Court having weighed the same, and having given more weight to one declaration of the juror than others, we are not prepared to say it decided contrary to the weight of evidence.

Per curiam.—Let the judgment of the court below be affirmed with costs.

HAVILAND, CLARK & Co., PLAINTIFFS IN ERROR, VS. ROBERT
B. HARGIS, DEFENDANT IN ERROR.

Section 11 of our limitation act, November 10, 1828, has no reference to defendants who reside out of the State of Florida, when the cause of action accrued.

This case was decided at Marianna.

Writ of error to Escambia Circuit Court.

The opinion of the Court contains a statement of the facts of the case, to which reference is made.

Haviland, Clark & Co. vs. Robert B. Hargis.—Opinion of Court.

Wright and Landrum for plaintiffs in error.

Jordan, Yonge, McClellan & Barnes for defendant in error.

WALKER, J., delivered the opinion of the Court.

The declaration in this case was filed to June Term, 1856, in the Circuit Court for Escambia County, on a note, of which the following is a copy, to-wit:

MOBILE, December 7th, 1849.

One day after date I promise to pay to the order of Haviland, Clark & Co., two hundred and thirty-two 70-100 dollars, value received.

(Signed,)

ROBT. B. HARGIS.

The defendant pleaded that none of the causes of action in the declaration mentioned accrued to the plaintiffs at any time within five years next before the commencement of this action.

The plaintiffs replied that the promise sued on by said plaintiffs was made in Mobile, in the State of Alabama, where both plaintiffs and defendant resided, and that afterwards the said defendant then and there obstructed and defeated the said plaintiffs from bringing and maintaining their said action, by the removal of the said defendant out of the State of Alabama.

To this replication the defendant demurred. The parties then submitted the fate of the case to the ruling of the court on the demurrer.

The court having taken time to advise thereof, sustained the demurrer, and gave judgment to the defendant for costs.

Plaintiffs then sued out their writ of error.

It is contended that the replication is good under section eleven of our limitation act of November 10, 1828, which reads thus: "If any person or persons, defendant or defendants to any of the aforesaid actions, shall abscond or

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conceal themselves, or by removal *out of the country* or of the county where he or they shall or do reside, when such cause of action accrued, or by other indirect ways defeat or obstruct any person or persons who have title thereto from bringing and maintaining all or any of the aforesaid actions within the respective times limited by this act, that then and in such case such defendant or defendants are not to be admitted to plead this act in bar to any of the aforesaid actions, anything in this act in anywise to the contrary notwithstanding.” Thomp. Dig. 444.

The first section of our act of 1846 (see Thomp. Dig. 443) reads thus: “Whereas, doubts have been suggested of the true intent and meaning of the use of the terms, ‘beyond seas or out of the country,’ used in the several acts of limitations heretofore or now of force in this State, for remedy whereof, *Be it enacted*, That the saving in the act of November 10th, 1828, and all other acts in favor of persons ‘beyond the seas or out of the country,’ until such persons shall have returned from beyond the seas, or from without the country, shall not be held, deemed or taken to extend to *persons* who were at the time of the making of the contract or accruing of the cause of action domiciled or resident within the limits of this State, but all such persons shall be put upon the same footing and shall have no other or greater rights than are possessed by residents and citizens of the State.”

Such is the legislative interpretation which the term “out of the country” has received in connection with the rights of *plaintiffs*, and we can see no reason why the same construction shall not prevail when that term is used in connection with the rights or liabilities of *defendants*.

We are satisfied that the 11th section of the act of November 10, 1828, does not apply to defendants who reside “out of the country,” that is out of the State of Florida, when the cause of action accrues. “Removal out of the country, or out of the county where he or they do or shall reside when

McLeod vs. Ward, Close & Co.—Statement of Case.

such cause of action accrued,” means removal out of the State of Florida or county in said State where he or they do or shall reside when such cause of action accrued. It is not probable that our Legislature intended to deprive those of our citizens who have emigrated hither of the privilege of protecting themselves by our statutes against the stale demands of non-resident plaintiffs which accrued abroad, after a great lapse of time, when all their evidence of payment may be lost or destroyed.

Let the judgment of the Court below be affirmed, with costs.

NORMAN A. MCLEOD, SHERIFF, &C., APPELLANT, VS. M. WARD,
CLOSE & CO., APPELLEES.

1. Where a *Rule Nisi* was taken against a Sheriff, calling upon him to show cause why he should not be compelled to pay over the amount of an execution in his hands, if it shall be made to appear that he had not made the money thereon, the Court has no authority to give summary relief in the premises, by ordering him to pay the money or to stand committed.
2. The plaintiff in an execution has a right to require the same to be returned into office at any time, and for a *false return* his only remedy against the officer is by *action*.
3. Where the money on an execution is shown to have been *collected*, the plaintiff in execution is entitled, under the provision of the 7th section of the act of 1833, to proceed *summarily* against the officer, by *motion* to the Court.

This case was transferred by consent of parties from Jacksonville, and was heard and determined at Marianna, the Hon. J. J. Finley, Circuit Judge, sitting in the place of the Hon. William A. Forward, Associate Justice, who was disqualified by reason of having been of Counsel in the Court below.

McLeod vs. Ward, Close & Co.—Opinion of Court.

For a statement of the facts of the case, reference is made to the opinion of the court.

DUPONT, C. J., delivered the opinion of the court.

At the Spring Term, 1857, of the Circuit Court of Marion county, *Rule Nisi* was taken against the appellant, as Sheriff, to show cause why he should not be compelled to pay over to the appellees the amount of a certain writ of *fi. fa.* then in his hands, wherein the said appellees were plaintiffs and J. H. Peck & Co. were defendants. To this rule the Sheriff answered in writing, denying that he had collected any part of said execution, and assigned various reasons for his failure so to do. Amongst the reasons so assigned he stated that he had ascertained from the record of deeds in the Clerk's office that the legal title to the premises which had been pointed out by the plaintiff in execution, to be levied on, was not in the defendant. Upon this answer coming in, the Judge below caused the following order to be entered upon the minutes of the court:

"The answer of the late Sheriff, N. A. McLeod, to the Rule against him in this case having been read and argument of counsel having been heard in relation thereto, it is hereby ordered, that the rule be made absolute, and that the said M. A. McLeod do pay over to the plaintiffs the amount of their execution within sixty days, or in default thereof that he be committed to prison and stand committed till the same be paid." From this order an appeal was taken to this court, and during the pendency of the appeal the death of the appellant has been suggested.

Upon this state of facts two questions have been proposed for our adjudication by the counsel of the appellant: 1st, whether the order of the court below has not become *nugatory* by the death of the party upon whom it was designed to operate? and 2d, whether it was such an order as was proper to be made in the premises?

McLeod vs. Ward, Close & Co.—Opinion of Court.

With reference to the first point, it is insisted that the order being in the nature of a punishment as for a *contempt*, and designed to operate only on the *person*, the death of the party condemned puts an end to its operative effect; that the appeal and all proceedings had thereon necessarily *abate*, and that the sureties on the appeal bond are exempted from any further liability thereon. As the responsibility of the sureties on the appeal bond is not properly before us in this proceeding, we decline to give or even to intimate an opinion on that point; and indeed from the conclusion at which we have arrived on the second question proposed, a consideration of the *first* becomes wholly unnecessary.

In considering the propriety of the order we need do little more than cite what was said by Thompson, J., in delivering the opinion of the Court in the case of Love, Sheriff, vs. Williams (4 Flo. R. 126), which we think settles the question. In that case, the court say: "We are not aware of any such proceeding at common law or by the statute of this State which authorizes summary proceeding by motion or rule against the Sheriff for a false return or for not levying an execution in his hands to be executed. A statute was passed in 1833 authorizing the plaintiff in execution, upon a return of *nulla bona*, to controvert the same and make up an issue thereon to be submitted to a jury in a summary manner, and authorizing a judgment to be entered on the verdict of a jury (Duval's Digest 9, § 8); but this section of the act was repealed by the act of February 15, 1834." (Duval's Digest 13, §5.)

In that opinion it is further remarked: "The plaintiff has a right to call upon the Sheriff for a legal return upon the process at every term of the court, by section 8 of the act of March 15, 1844. (Thomps Dig. 355.) If the return is false, as where the Sheriff returns *nulla bona*, when he might have made the money or has given undue preference to a writ subsequently delivered, the plaintiff must resort to

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his action on the case for a false return for not levying the writ. (Tidd's Prac. 1022.) In such action the facts upon which the liability of the Sheriff is claimed to be founded, as well as his defence, will, under the guidance and instruction of the Court, be passed upon by a jury. This is his right, and he cannot be deprived of it without his express consent."

In the case before us, the Sheriff *denies the receipt of any money* upon the execution, and in his answer to the rule assigns his excuse for the failure to make the money. The facts upon which this excuse was founded, in the words of the opinion above cited, constituted "his defence," and it was his right to have them "passed upon by a jury." Had it been made to appear *that the money had been collected*, then, under the provision contained in the 7th section of the act of 1833, the plaintiff in execution might have proceeded summarily against him to compel the payment over. That section is in the following words: "If the Sheriff shall fail or refuse to pay over money by him collected within thirty days after the same shall have been by him received, upon demand made by the plaintiff or his attorney of record, he shall be liable to pay the same and twenty per cent. damages, to be recovered *by motion in Court*; provided, ten days previous notice be given him of the intention of the person claiming the money to make such motion." (Thomp. Dig., 358.)

We are of opinion that the judge of the Circuit Court had no authority to make the order complained of. It is therefore ordered and adjudged that the decision of the Circuit Court upon the *Rule Nisi* be reversed with costs, and that the order made thereon be directed to be vacated, annulled and set aside.

It is further ordered that a transcript of this judgment be made by the Clerk of this Court, duly authenticated under his seal of office, and that he forward the same to the Deputy

Griffin vs. Orman.—Statement of Case.

Clerk of the Supreme Court at Jacksonville, to be entered upon the minutes of the Court at that place, as of February Term, 1860.

JAMES GRIFFIN, SHERIFF, &C., AND EX-OFF. ADMINISTRATOR OF RUFUS SEWALL, DEC'D, APPELLANT, VS. THOMAS ORMAN, SURVIVING PARTNER OF ORMAN & YOUNG, APPELLEES.

1. As a *general rule*, wherever exceptions will lie to the Master's report, it must be regularly confirmed before any order can be made upon it.
2. A decree directing a reference to a Master, for the purpose of ascertaining *any material fact* in the case, is not a *final* decree.
3. To give the Court of Appeals of the Territory of Florida jurisdiction of an appeal from a decree of the Superior Court, it was necessary there should be a *final* decree in the cause; appeals did not lie in that Court from interlocutory decrees or orders.
4. This Court will not be bound by the decision of the Court of Appeals of the Territory in a case where it appears said Court had no jurisdiction.
5. When there has been no *final* decree in a cause, excepting the one appealed from, this Court may, on appeal, examine the whole case, so far as it has been acted upon by the Circuit Court, and all prior or interlocutory orders or decrees any way connected with the merits of the final decree are open for consideration, notwithstanding such order or decree may be one of a Court of Appeal affirming a similar order or decree of an inferior Court.
6. If a dormant partner shares in the profits of a business, he is liable at law for all contracts, within the legitimate sphere of that business, by and with the firm.
7. A suit and judgment recovered against two of a firm is not a judgment against a third member not named in the pleadings.
8. Creditors cannot get relief in a court of Equity until they have judgment at law and return of *nulla bona*, or what is equivalent thereto, in the *fi. fa.*
9. Creditors of a partnership have no lien upon the goods sold after a delivery thereof, and on suits by them they execute their judgment against the effects of the partnership and any other effects of the individual members parties to said suit—until then they cannot prevent the partners from *bona fide* selling and transferring the same even to one another.

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10. The equitable doctrine of subrogation or substitution to the place of the creditor without any agreement, is applicable in cases where the person advancing money to pay the debt of a third party stands in the situation of a **SURETY**, or is compelled to pay it to protect his own rights.
11. As a general principle, each partner of a firm has a specific lien on the partnership stock, not only for the amount of his share, but for moneys advanced by him beyond that amount for the use of the co-partnership, and that this lien extends to property purchased with the partnership funds as well as that standing in the partnership name; but where they *bona fide* sell and transfer the property to one of the firm, with *intention* that the effects assigned and sold are to be appropriated to the *private use* of the purchasing partner, then this lien is lost and the property ceases to be partnership property.
12. After a defendant has answered a bill in Chancery and submitted himself to the jurisdiction of the Court without objection, it is too late to insist the complainant has a perfect remedy at law, unless the Court of Chancery is wholly incompetent to grant the relief sought in the bill.
13. A Court of Equity will entertain a bill of *quia timet* in a proper case filed for the purpose of enforcing a specific performance and preventing a possible future injury, thereby quieting men's minds and estates, &c.
14. Equity may decree the performance of a general *covenant of indemnity*, though it sounds only in damages.
15. Chancery may order an instrument to be delivered up to be cancelled when it is void from matter appearing from proof taken in the cause, and will cancel agreements founded in fraud, imposition and misrepresentation.

This case was decided at Tallahassee.

FORWARD, J., read the following statement of the case, prepared by him:

The following is a brief statement of this case, as appears by the record:

On the 25th day of March, A. D., 1826, a partnership was formed between Thomas Orman, Andrew Young, and Rufus Sewall, under the style of Orman & Young, *Sewall being a dormant partner*; said partnership was to continue for two years from the 7th March, 1826.

The partnership articles, being in writing, read as follows, viz:

"This agreement, made this twenty-fifth day of March, one thousand eight hundred and twenty-six, by and between

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Thomas Orman and Andrew Young on the one part, and Rufas Sewall on the other part, witnesseth—

“That the said Thomas Orman and Andrew Young agree to transact and carry on business in the mercantile line at St. Andrew’s Bay and Chipola, in Washington and Jackson counties in the territory of Florida, for the term of two years, commencing on the seventh day of March, instant, and continuing to the seventh day of March, one thousand eight hundred and twenty-eight, the expense of conducting the business to be charged to expense account, and to comprehend all that is actually expended in transacting said business, together with the amount of said Orman & Young’s board, the other expenses of said Orman & Young to be charged to their individual accounts; the said parties—that is to say, the said Sewall, Orman & Young—are not, in any instance, to take from the concern any money or moneys, or property of any kind, for individual purposes, except for necessary expenses, and are not to enter into any speculation on account of the concern, of any name or nature, out of the course of business, without the consent of all the parties, and are to make no use of the name of the firm or concern to promote their individual purposes. The said Sewall, on his part, agrees to aid in purchasing or to purchase, accept or to have accepted, by Moses Sewall, any time previous to the first day of October, one thousand eight hundred and twenty-six, a sum not to exceed one thousand dollars, and after the first day of October aforesaid, all sums that may be deemed necessary for conducting the business, either by purchasing or accepting; providing always the said Sewall becomes responsible, in his individual capacity, in an amount not exceeding four thousand dollars at any one time, and the said Sewall will at all times be acceptor or responsible for the said concern, during the term of the two years aforesaid, for all or any sums, as before stated, providing the concern in no instance have right or power to subject him, the

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said Sewall, to become responsible for any sums exceeding four thousand dollars at any one time, and in no instance will the said Sewall be responsible, at any one time, for said concern for any sums exceeding the amount aforesaid; all transactions made by said Sewall for the concern to be free from all charges of commissions and all others, except such as the said Sewall has actually to pay, the concern, in all instances, to pay the actual expenses attending the business. At the expiration of the aforementioned two years, or as soon thereafter as the said Orman & Young can bring the business to a close, or to such a state as to determine the actual amounts of net profits arising on all the business transacted within the aforesaid two years, to be divided into proportions of one-third each, one-third of the whole amount of net profits arising in the business to be paid over to the said Sewall, by the said Orman & Young on or before the 1st day of March, one thousand, eight hundred and twenty nine, with interest, at six per cent. per annum, from and after the time of ascertaining and collecting the amount of net profits; but if the said Orman & Young do not pay over to the said Sewall such amount of net profits as may be ascertained and collected, on or before the first day of March, one thousand eight hundred and twenty-nine, then the said Orman & Young shall pay interest on the same to said Sewall, at two per cent. per month, until the same be paid. In case the said Sewall has, in any instance, to advance money or moneys for the said concern, he, the said Sewall, shall make no charge for such advances, but shall receive from the said concern, as full compensation for all such sums advanced, two per cent. per month until all such sums are refunded, unless a special agreement to the contrary be made.

“At the termination of the co-partnership—say, on the 7th day of March, one thousand eight hundred and twenty-eight—if any loss or losses has been sustained by the said concern,

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the parties to the agreement are to suffer in equal proportions of one-third each—to say, the said Sewall one-third, said Orman one-third, and said Young one-third. All the profits belonging to said concern, at the expiration of the aforementioned two years, to be valued by the said parties, and sold or bought by them as they may agree.

“The said Orman & Young are to settle and close the business transacted within the aforementioned two years, without any charge, except what may be actually necessary for closing and settling the same. All the business transacted within the aforementioned two years, in which Thomas Orman, Andrew Young and Rufus Sewall are concerned, shall be done under the name, style and firm of Orman & Young. (Signed.)

RUFUS SEWALL,
THOMAS ORMAN,
ANDREW YOUNG.

“Test: DANIEL MCKENZIE.”

Under these articles the said firm carried on business during said term. The business was conducted at St. Andrews’ Bay and Chipola, in Florida, by said Orman and Young in person, and under the name and style of Orman & Young, the said Sewall residing in Alabama; that at the expiration of the co-partnership the said Orman & Young, who are in possession of all the books, accounts, goods, &c., as well as in possession of full knowledge of the business of said firm, make out severally a statement or estimate of the business of the firm for said Sewall, with a view, as is alleged by Sewall but denied by Orman & Young to a final settlement between them.

The following is the estimate of Mr. Orman, viz:

Amount of notes,	\$28,400
Ac’t,	16,000
					<hr/>
					\$45,000

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Amount brought forward,	.	.	\$45,000
Goods on hand,	.	.	7,000
Cotton on hand,	.	.	4,000
Gin house and lot,	.	.	
Horses and mules,	.	.	1,000
Corn, pork, &c.,	.	.	300
1 negro man,	.	.	300
1 negro woman and child,	.	.	600
2 negro boys,	.	.	900
			<hr/>
			\$59,800
Houses and lot at the Bay and this place,			
at least,	.	.	200
			<hr/>
			\$60,000
			<hr/>
Debts due from the concern,	.	.	24,000
R. Sewall's am't previous to 7th March,			
1828, his share of profits,	.	.	6,000
Am'ts owing here and amounts settled and			
bad debts	.	.	5,000
			<hr/>
			\$35,000

The estimate made by Mr. Young and furnished said Sewall, as is alleged with a view to said settlement but denied, shows that on the 1st November, 1829, there was due the said Sewall on account current with said firm the sum of \$7,036 88. Whether Mr. Orman included this in the "debts due from the concern" does not appear.

With these statements as a basis, a final settlement took place between the partners on the 14th January, A. D. 1829. At this settlement Orman & Young sold out their entire interest to Sewall for the sum of \$17,500, to be paid them in assets of the firm. It is admitted that Orman & Young received from Sewall the said sum of \$17,500 out of the said assets, and that *they executed to Sewall a conveyance of all*

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their interest in the assets of the concern.—(See conveyance below.) At this settlement Sewall gave his *bond* to Orman & Young, with one E. J. Bower as surety, in which said Sewall *assumes the payment* of all the debts due by the firm previous to 14th January, 1829, and *binds* himself and surety in the penal sum of \$20,000 to pay the debts as aforesaid. That the bond may appear, it is given at full length:

“Know all men by these presents, that we, Rufas Sewall and Ebenezer J. Bower, are held and firmly bound unto Orman & Young in the penal sum of twenty thousand dollars, for the payment whereof, well and truly to be made, we bind ourselves and heirs and assigns, jointly and severally, firmly by these presents, signed with our hands and sealed with our seals, this the fourteenth day of January in the year eighteen hundred and twenty-nine.

“The condition of the above bond is such that whereas the above bound Rufus Sewall has purchased from Thomas Orman and Andrew Young, without claim, drawback or recourse upon them, the said Orman & Young in every way whatever; and the said Sewall has assumed the payment of all the debts of every description now due, or that hereafter become due from said firm for any and all transactions for account of said firm previous to the above date, and to recognize all agreements from the citizens of Jackson and Washington counties, Florida, whether oral or written, in purchase of cotton or other property, where they become liable to pay certain sums of money. Now, if the said Sewall shall well and truly perform his obligations, by paying the debts as aforesaid, and shall perform all the contracts and incur all the liabilities of the said firm, then this obligation to be void, else to remain in full force and virtue.

“Signed,

RUFUS SEWALL, [L. s.]

E. J. BOWER, [L. s.]”

At the same time Orman & Young executed this convey-

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ance and transfer or assignment to said Rufus Sewall, viz:
“Territory of Florida, Jackson County:

“This indenture, made this fourteenth day of January, in the year of our Lord one thousand eight hundred and twenty-nine, between Thomas Orman and Andrew Young, merchants, trading under the firm and style of Orman & Young, of the Territory and county aforesaid, of the one part, and Rufus Sewall, of the State of Alabama, of the other part, witnesseth: that for and in consideration of the sum of seventeen thousand five hundred dollars, paid by the said Sewall to the said Orman & Young, the receipt whereof is hereby acknowledged, the said Orman & Young have bargained, *sold and conveyed, relinquished and assigned over* to Rufus Sewall, his heirs and assigns, all the land, negroes, houses, store, goods and merchandise, horses, mules, gin, cotton, corn, pork, notes, accounts, and all claims and demands whatever, of any description, in any way belonging to or acquired by the said firm of Orman & Young, with the exception of the notes accounts and other property contained and specified in the annexed schedule, amounting to seventeen thousand five hundred dollars and seventy-three cents; and the said Orman & Young, for themselves, their heirs and assigns, do covenant and agree to and with the said Sewall, his heirs and assigns, the interest, rights and property, *delivered* as aforesaid AGAINST THE CLAIM OF THEM, the said Orman & Young, their heirs and assigns, will by these presents forever *warrant and defend*. In testimony whereof, the said Thomas Orman and Andrew Young have hereunto set their hands and affixed their seals, the day and year above written.

“Signed,

THOMAS ORMAN, [L. s.]
ANDREW YOUNG, [L. s.]”

On the 2nd of January, A. D., 1829, the said Orman & Young filed the bill of complaint, called by them a bill of *quia timet*, in the Superior Court of the county of Jackson,

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before the Judge of the Western District of Florida, sitting in equity, setting forth in substance the anterior existence of said partnership as expressed in the articles of co-partnership, the final settlement of the affairs of said co-partnership between all the parties thereto, the sale of their interest to said Sewall in said concern, charging that said sale was made by them to said Sewall upon the terms that the said Sewall should well and truly pay all the debts of said firm, and should perform all the contracts and incur all the liabilities of the same; that he assumed the payment of all the debts of every description, that were then due or to become due from said firm, &c.; “that the debts due and to become due, *including the amount due said Sewall*, as also the liabilities of said firm of a pecuniary character, did not amount to more than the sum of twenty-six thousand and fifty-four dollars and sixty-three cents, and, at the time of the contract and sale aforesaid, were estimated by said Sewall (the said Sewall having at all times access to the books of the firm) at the sum of \$28,700 *in which the sum due said Sewall was included;*” that at the time of the sale they received from said Sewall the bond, with Bower as his security, above set forth; that in taking said bond they relied exclusively upon the pecuniary responsibility of Sewall alone, &c.; that said Bower was only accepted as security from the reliance which the said Orman & Young placed in his virtue and integrity, &c.

The bill further states, that said Sewall, in addition to his obligation contained in said bond, afterwards wrote to Messrs. A. Whiting & Co., J. L. Florence and W. A. Gasquet, who were creditors of the said firm of Orman & Young, and *assumed to pay them.*

The bill further charges that at the time of the filing thereof, “*neither of these claims have as yet been paid;*” “*on one of these your orators have been sued, and are in daily expectation of being sued upon the others.*”

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The bill further charges, that up to that time the said Sewall had only paid, of the debts due and owing by said firm, the sum of \$872, and that they, the said Orman & Young, *had paid* to Kipman & Hyer, of Pensacola, \$27.15, and that all of the above debts had been then due a year and more.

The bill sets forth and describes certain real estate that the said Sewall, under the contract and sale aforesaid, received from the firm of Orman & Young, *purchased with funds of said firm*; that he received under said contract a negro woman and boy, now at T. M. Bush's, in Washington county, and that he has in possession a negro man named Billy *not received from said firm*.

The bill further states, that said Sewall had placed in the hands of attornies, for collection, the debts which were due and owing said firm, and which had been assigned to said Sewall under said contract.

The bill further charges, that the said Rufus was then proceeding with all possible dispatch to close his business in this Territory; that he is offering his land for sale, and these complainants have reason to fear, and do apprehend, not only inconveniences, trouble and vexation in and about the payment and liabilities of said firm of Orman & Young, but that unless they have speedy relief from this honorable Court, the said Rufus, in order to avoid the payment of said debts and in compliance with his obligation as aforesaid, will transfer, dispose of or so secure his means that there will not be found property to reimburse the said Orman & Young, were they to rely upon the remedy at law upon said bond.

The bill further alleges, that the said Orman & Young believe that a proceeding at law would be inadequate and incomplete, by reason of the peculiar situation of said debts and their own situation, and they verily believe that before a proceeding of this kind could be brought to a final and successful judgment, the said Sewall will have left this Ter-

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ritory and have transferred and otherwise disposed of the means whereby the same might be satisfied.

The bill further sets forth, that all of said creditors are exceedingly pressing, impatient for the payment of their demands; that, relying upon the obligation of said Sewall, they had made no arrangements to pay the same, nor will it be in their power so to do, without extraordinary trouble and *great loss to themselves, &c.*

The prayer of the bill was, that the Court would grant them the *writ of quia timet*, directed to the Marshal to take into his possession all the property of the said Sewall, and the same to keep until said Sewall shall enter into bond, with sufficient security, to deliver the same whenever it shall be required by the order or decree of the Court; or that he may take such part charged in this bill as having been received from or purchased with the funds or means derived from the firm of Orman & Young as aforesaid; also a writ of injunction, restraining the attornies of Sewall from paying over moneys in their hands, and *asking that the same* may be applied to the payment of the debts of said Orman & Young *assumed* as aforesaid by said Sewall; also that the Court *decree the property received by Sewall from the co-partnership of Orman & Young under said purchase, and also the property purchased with the funds of said firm A SPECIFIC FUND*, out of which the debts aforesaid should be paid; that the said Sewall may be *compelled specially to perform* the said bond, and the conditions thereof, by paying off and satisfying said debts of said Orman & Young, as aforesaid, and incurring all the liabilities and contracts as provided in said bond and condition thereof.

The said Ebenezer J. Bower and John O. Sewall, and Peter W. Gautier, attornies of Rufus Sewall, are also made *parties* to this bill, and the same is sworn to.

On the 3d of January, 1829, his Honor Judge Breckin-ride made the following order on said bill:

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“On reading and considering the complainant’s bill, it is ordered that the writ *quia timet*, as prayed for, issue against the defendant Rufus Sewall, requiring the Marshal to seize and sequester in his hands, until the further order of the Judge acting in equity, the property of the said Sewall specified in said bill as having been acquired by the partnership or purchased with the partnership funds, or to enter into bond to the Marshal in the sum of ten thousand dollars, to save the said Orman & Young, the complainants, from the responsibilities and losses set forth in their said bill, and that the said property shall be forthcoming to answer such demands as the said Sewall has agreed to respond to and satisfy, so as to release the respondents from responsibility therefor, according to the undertaking alleged in the bill, the said complainants giving security in the sum of three thousand dollars to insure all damages which may be occasioned by the issuing of the writ and of granting this order; and it is also ordered, that Peter Gautier be enjoined, until the further order of the Judge, from paying over to the said Sewall any sums of money which may be collected by him from debts due to the firm of Orman & Young or from delivering to the said Sewall any accounts, bonds, notes or securities for the payment of money; and it is further ordered, that the usual writ of subpoena issued to the parties defendants named in the bill, who are required to answer the complaints therein contained.”

On the 21st of January, 1830, the said Rufus Sewall *answers* the said bill, in which he admits the partnership according to said articles, and avers that the firm continued doing business after the expiration of the partnership limitation, by and with the consent of the co-partners, until the final settlement, on the said 14th of January, 1829; that being anxious to withdraw and close the concern, he made several propositions, which were not acceded to, and finally directed a schedule of all the property of said firm; that said

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Orman & Young produced to him an estimate of all the debts due and owing to said firm and the debts due and owing by the said firm; that upon *this estimate* the said Orman & Young made the proposal which was acceded to by him, as appears in said bond. In said answer he avers that *since* he had assumed to himself the responsibilities charged in the complainant's bill, he has discovered the grossest errors and misstatements in the schedule rendered him by said Orman & Young, to the great damage of his affairs in the settlement of the co-partnership concerns. He further sets forth in the answer in what those errors and misstatements in said schedule consists, all of which he avers to be contrary to equity and good conscience.

The said Sewall, in his answer, denies that he estimated the liabilities of the firm. He also denies that said Bower was accepted as security, for the reasons stated in said bill; he avers that he was and is still able to comply with his obligations; admits that he has been endeavoring to sell the lands, but denies that from circumstances he should be suspected of violating his engagements, &c.

After filing the answer, the said Rufus Sewall moved to dissolve the injunction granted, upon two grounds: 1st, because the matters contained in the bill do warrant the interlocutory order of the Court; 2d, the equity of the bill is denied by the respondent's answer. And on the 5th March, 1830, Judge Breckinride *ordered and decreed* that the injunction and order of sequestration heretofore granted in this case be *dissolved and rescinded*.

After the said injunction was rescinded, to-wit, on the 27th July, 1830, the said Rufus Sewall filed in the same Court a cross bill, setting forth, in substance, that at the time of the final settlement of the business and division of the profits of the said firm of Orman & Young, he was under pressing necessity for money; that his affairs were embarrassed; that he had made several propositions of settlement

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with said Orman & Young without success; that relying on the statements and schedules made by Orman & Young and their representatives of the business, he was compelled to accept the proposition made by them to purchase their interest at \$17,000; that he resided in Alabama, and knew but little of the concerns of said firm, that Orman & Young knew all about it.

The cross bill further sets forth the errors in the statements made by them, the falsity of the statements made, the injury resulting from said contract to him, said Rufus Sewall, and that fraud had been practiced upon him, and prays that the bill be considered in the nature of a cross bill to the bill of Orman & Young pending against him in said court; that the said Orman & Young be required to answer it, and that *the said agreement* entered into between the said Sewall and the said Orman & Young, for the adjustment of their partnership concern, BE SET ASIDE AND HELD FOR NAUGHT, AND THE BOND GIVEN by this complainant and said Bower to said defendants, as aforesaid, be ANNULLED and *given up*, or that the court will direct the ascertainment of the amount of errors and misstatements, and deduct the same, &c.

Plea and answer to the cross bill was put in by said Orman & Young on the 18th day of December, 1830, denying that any estimate or statement was submitted to said Sewall by them as accurate or current, showing the condition of the business, or that he was informed by them that the estimates or statements referred to in his bill were accurate. They further say that said Sewall inquired for himself, examined the books, and had access to them when he wished; that all calculations and estimates were general; that no trick or concealment was used to induce said Sewall to purchase; and they aver that had they known the extent of Sewall's embarrassments *they would not have sold to him*; that the business was carried on between them in the way of bargain and sale, in which, for an aggregate amount, they sold the

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aggregate of the co-partnership property, on which sale a balance of each members' share of the concern was not attempted to be ascertained and they *plead the said bond* and the covenants therein contained IN BAR of said cost bill.

Another answer to said cross bill it seems was filed in June Term, 1831, which in substance is about the same as the plea and answer.

Replication to the original bill is filed June Term, 1831.

It also appears on the record that on the 1st July, 1831, Andrew Young appeared in open court and made *affidavit*, in which he says that judgments have been recovered against them and suits instituted; that most of the creditors decline suing Sewall; that unless by some order of the court they are enabled to raise the amounts from the sale of the property and effects of said Orman & Young, *transferred to said Sewall*, as stated in said bill, that a future recovery would avail but little for said Orman & Young, as he is disposing of his property, with the view of defeating the rights of said Orman & Young; that since the filing of said bill, the said Rufus disposed of a large amount of the notes and accounts received from said firm, *and received therefor* lands and negroes to a large amount, which he is advised ought also, in addition to the property named in the said bill, to be first subject to the said firm debts in preference to other claims.

On the 8th of December, 1836, the said Orman & Young filed a supplemental bill against Rufus Sewall and others, setting forth, as events which had taken place since the filing of the original bill, that judgments had been recovered against them by some of the creditors, and suits instituted by others; that the bond of said Sewall, to pay and satisfy said debts had not been complied with; that there is property consisting of lands, negroes, notes and accounts, derived by said Sewall from said purchase, as stated in said original bill, sufficient to pay off said demands; that the same *should*

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first be made subject to the payment of said debts; that the suits are against them, Orman & Young, though it was known to the plaintiffs that said Sewall had bound himself to pay the same, and though it was known to plaintiff's attorney that Sewall, in his answer to the original bill, expressly stated he was a partner of the firm of Orman & Young at the time said debts were contracted. In the prayer of this supplemental bill they ask that the said suits, when rendered to judgment, may be assigned to them (Orman & Young) and subject to their control, or that the Marshall be ordered to levy the same of the lands and tenements, goods and chattels, of the said Sewall, or of such lands and tenements, goods and chattels of said Sewall, obtained from said firm, or with the proceeds of said firm; that such decree may be made in relation to the judgment of J. L. Florence, which your orators have paid, as may comport with the principles of equity.

Auditors were appointed by the court to audit the books and accounts of the firm, who made their reports, which report was excepted to by Orman & Young.

A mass of testimony was taken under the original bill—some by commission and some before auditors—as appears in the printed record, but which is unnecessary to set forth in this statement of the case.

The original bill, the cross bill and plea thereto, and supplemental bill, were set down for hearing *together*.

On the 14th April, 1834, the following decree was entered thereupon in the Superior Court of Jackson county, to-wit:

“The bill and answers in the above cases, the plea to the cross bill, report of auditors and exceptions thereto, together with the evidence, exhibits and proofs being read and heard at the same time:

“1st. It is ordered and decreed, that the exceptions to the report of the auditors be sustained and the reports set aside.

“2d. It is ordered and decreed, that the plea to the cross

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bill be sustained and the bill dismissed; and it appearing by said original bill and answer, and the exhibits and proofs, that the said respondent Rufus Sewall received of the firm of Orman & Young, the complainants, the several lots of land in said bill mentioned, and that he purchased and acquired the several other lots and parcels of land and negroes in said bill mentioned with the funds and means of said firm, as specified in said bill; and it appearing that the following debts have been paid off and satisfied by said complainants by virtue of judgments of the Superior Court of Jackson county, to-wit: a judgment in favor of J. L. Florence, obtained at the June term of said Court, 1830, for \$567.56 principal, and the sum of \$33.37 costs; a judgment in favor of Augustus Whiting, Courtland Palmer and Robert Stark, merchants and co-partners, trading under the firm of A. Whiting & Co., obtained at the June Term, 1831, for \$1,349.92 principal, and the sum of \$31.59 costs; a judgment in favor of Henry Parish, Peter Corney, Jr., William A. Gasquet and James A. Gasquet, merchants, trading under the firm of William A. Gasquet, &c., obtained at the June term, 1831, for \$934.35 principal and the sum of \$22.22 costs; a judgment in favor of Joseph Brewster and Lemuel Brewster, merchants, trading under the firm and style of J. & L. Brewster, obtained at the June term, 1831, for \$338.12 principal and the sum of \$15.98 costs; a judgment in favor of Harteman Hill and Howard Henderson, merchants and co-partners, trading under the firm of Hill & Henderson, obtained at the December term, 1831, for \$242.10 principal and the sum of \$26.66 costs; a judgment in favor of William Taggard and Tobias Lord, merchants and co-partners, trading under the firm of William Taggard & Co., obtained at the December term, 1833, for \$427.12 principal and the sum of \$10.40 costs, and the following judgment in favor of Peter W. Gautier, Jr., obtained in the County Court of Jackson county, at the April

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term, 1833, for \$80 principal and ——— costs, and the following judgment in favor of Peter W. Gautier, Sr., obtained in a Court of Justice of the Peace, before Benjamin Hogg, Esq., of Jackson county, for \$48 principal and the sum of ——— costs; and that they have paid off and satisfied the following debt without suit, to-wit: Kopman & Hyers' account, paid 13th June, 1829, for \$27.15; and that the following debts are still due and unpaid, viz: a debt due to William Sheldon and Samuel D. Dixon, merchants and partners, trading under the firm of Sheldon & Dixon, now in suit on a note of \$128.69 and the sum of \$69.59 interest, and a debt due Robinson & Booth by note, dated in May, 1828, for \$71.36, or thereabouts, with interest, all of which were contracted before 14th January, 1829: It is therefore ordered that the Master *ascertain* the amounts *so paid* under judgments of said court, calculating the interest on said judgments from the date thereof up to the date of this decree; that he *ascertain* the amount paid under the judgment of the County Court of Jackson county, and in said Justice Hogg's Court, calculating the interest from the 1st May, 1833, up to the date of this decree, AND ALL SUMS due and owing by said complainants as aforesaid contracted before the 14th January, 1829; and the amount so ascertained it is hereby ordered, adjudged and decreed to be *paid* to said complainants by the said respondent, and that the partnership property received by said respondent, or which was purchased or acquired by and with the funds of the co-partnership, be, in the first instance, applied to the discharge of the complainants' demand, *ascertained as above*; and in default of the payment of the said sum within twenty days of the date of this decree, it is further ordered, adjudged and decreed that the said complainants have their execution for the said sum, and that they be and hereby are substituted and shall stand in the place of the several creditors aforesaid, and that the execution issued as aforesaid be levied and

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executed upon all or so much thereof of the property aforesaid as will be sufficient to satisfy and pay the same so ascertained by the said Master according to the directions of this decree, and that the Marshal give legal notice of the time and place of sale; and it is further ordered, that so much of said sum and amounts as have *not been paid* by the complainants be by the Marshal paid into court to *await the further order of the court*, and the balance paid over to the complainants or their solocitor; and it is further ordered, adjudged and decreed that the said complainants recover of the respondent their costs in this behalf incurred, and that the same be taxed by the Master.”

From this decree the said Rufus Sewall *appealed* to the Court of Appeals of the Territory of Florida, consisting of the Judges of the several Superior Courts in the Territory, which appeal was heard at Tallahassee on the first day of February, A. D. 1838.

One of the Judges dissenting, the majority of the court entered the following order as the opinion of the court:

“The court having maturely considered the transcript of the record of the decree aforesaid, submitted at the last term of this court, and arguments of counsel then heard and being now fully advised of their judgment to be given in the premises, doth order, adjudge and determine that *so much* of the final decree rendered in this cause by the Superior Court of Jackson county, while sitting in chancery, as substituted the appellee for and in the place and stead of the creditors of Orman & Young as relates to the debts due from said firm which had not been paid by the said appellees at the time said decree was rendered, be and the same is hereby reversed, and that so much of the said decree as authorizes and directs that the said appellees have *execution* against the appellant for the amount which the Master shall subsequently ascertain to be due from the said appellant be and the same is also reversed, and that the said decree in all other

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things be and the same is hereby affirmed ; and it is further ordered and adjudged that this cause be *remanded* to the said Superior Court of Jackson county for such further and other proceedings and decree of that court shall deem right and proper, according to the principles of equity, between said parties, conforming in said proceedings and decree to the principles laid down and established by this court in said cause ; and it is further ordered that the appellant recover of the appellees his costs herein expended, and the said cause be remanded accordingly.”

The mandate being sent down to the court below, on 30th May, 1844, the cause was again docketed in the Superior Court in and for the county of Jackson. In 1845 Florida was admitted into the Union as a State, and under the Constitution of the State and the acts organizing the same the Territorial Superior Court was abolished and courts called Circuit Courts established, having jurisdiction of chancery cases.

This cause came on again to be heard in the Circuit Court of the State, in said county of Jackson, on the 9th of May, A. D. 1846, and that court then entered the following decree, to wit:

“And now, at this Term, came the said parties, and the judgment and decree of the court of Appeals of January Term, 1838, being exhibited, whereby the judgment and decree of the Superior Court, in the Western District of the Territory, sitting in and for the county of Jackson, as a Court of Equity, passed and made on the 4th day of April, 1834, was in so much reversed, viz: So much as substituted the said Thomas Orman & Young, for and in the place and stead of the creditors of Orman & Young as relates to the debts due from said firm which had not been paid by them at the time the said decree was rendered, and so much of the said decree as authorizes and directs the said Orman &

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Young to have execution against the appellant, Rufus Sewall, and the said decree in all other respects and things was affirmed, and the said cause was remanded to the said Superior Court for further proceedings; and it further appearing that this cause was, by an order of the Superior Court of the Apalachicola District, sitting in and for the county of Jackson, docketed on the equity side of this court, in the name of Thomas Orman, survivor of Andrew Young, and of Samuel Stephens, Esq., Sheriff of said county of Jackson, *ex officio* administrator of the said defendant, Rufus Sewall, deceased; and it further appearing that Sears Bryan, Esq., Clerk and Master of the said Superior Court, did on the said fourth day of April, 1834, report that there was due the said Orman & Young, for principal and interest of the sum of money paid by them, said Orman & Young, and due and owing to the creditors of the said firm, the sum of five thousand three hundred and twenty-one dollars and thirty-six cents, of which sum two hundred dollars and five cents principal, and one hundred and eight dollars and fifteen cents interest, making three hundred and eight dollars and twenty cents was the amount yet due and owing to the creditors of the said firm; and it further appearing that no exceptions have been filed to the said report of the said Sears Bryan, Clerk and Master,—

“On the motion of Leslie A. Thompson, solicitor and of counsel for the said complainant, it is ordered and decreed that the said report to be ratified and confirmed, so far as it ascertains the amount paid by the said complainant and the said Andrew Young, and ascertained to be the sum of three thousand nine-hundred and eighty-seven dollars and fifteen cents, for principal, and the sum of one hundred and forty-one dollars and twenty-two cents costs, and the interest on said two sums, up to the said fourth day of April, 1834—eight hundred and forty-seven dollars and forty-two cents—making an aggregate of four thousand nine hundred and

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seventy-five dollars and thirty-nine cents, paid by compulsion of suit; and the further sum of thirty-seven dollars and seventy-seven cents, for principal and interest, up to said time, paid without suit, making an aggregate sum of five thousand and thirteen dollars and sixteen cents, the amount so found due said complainant, survivor as aforesaid, with legal interest thereon, from the date of said report, to wit: the fourth day of April, A. D. one thousand eight hundred and thirty-four, within sixty days from the date of this decree; or in default thereof, that Wade Keyes, Esq., one of the Masters in Chancery of this Court, do proceed to make sale of the several tracts and parcels of land in complainant's said original bills specified and ascertained by the said decree of the Superior Court of Jackson county to have been purchased with the said partnership funds, and subject to the payment of the said debt due said complainant—the said Master to give thirty days public notice of the time and place of such sale. He shall sell the said property for cash, and pay to the said complainant survivor, as aforesaid, the said sum of money so due him, as aforesaid, with its interest; and that he make report of said sale at the next term of this Court, and pay the surplus money, if any, arising from said sale, after paying, first, the expense of said sale, and the cost of suit, and then the said complainant, survivor as aforesaid, be paid into Court, to abide its further order."

"Dated, 8th May, 1846."

The cause comes to this Court on an appeal from this last decree.

The appellant, by his attorneys, assigns the following errors in the record and proceedings of the decree aforesaid:

1st. The Court erred in giving a decree for complainant below; the decree should have been for defendant, dismissing complainant's bill.

2d. The substitution asked for is an anomaly in legal pro-

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ceedings, without precedent or justification in right or reason, and impossible to be carried into effect.

3d. There is no such lien in law or equity as is asserted by the bill; the complainants had taken security, and there is no authority in the Court to give them an additional one.

4th. The Court had no jurisdiction of the case, being one neither of mistake, accident, fraud nor trust.

5th. The decree does not pursue the mandate of the Court of Appeals; there was no report of a Master in conformity thereto, and a report was directed to be made before rendering a final decree.

6th. The whole proceeding is irregular, illegal, defective and improper, as far as the action of the Circuit Court is concerned.

Thos. Baltzell and M. D. Papy for appellant.

A. H. Bush, Richard F. Campbell and C. C. Yonge for appellees.

FORWARD, J., after reading the statement prepared by him, proceeded to deliver the opinion of the Court.

It is contended by the counsel for appellant, and conceded by Mr. Bush, one of the solicitors for appellee, that the first error assigned, which is, that the decree should have been in favor of the respondent in the Court below instead of the complainant, opens the entire record for the consideration of the Court, and renders necessary an examination of this cause upon its merits, and the cases of *LeBaron & Colquit vs. Fauntleroy et al.*, 2 Florida, 276, and *Life Ins. and Trust Co. vs. Cole*, 4 Fla., 362, are cited to maintain this position.

Were this cause now for the *first time* before a Court of Appeal, these cases would be conclusive, under the act of February 10th, 1832, which gives authority to the Appellate Court to pronounce "*such judgment, sentence or decree as the Court below ought to have given.*" An appeal in

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equity is substantially a re-hearing of the cause, and the appeal opens the whole case as it is presented in the record, or it opens for consideration all prior or interlocutory orders or decrees connected with the merits of the final decree. But this case has once been acted upon by an Appellate Court, and in consequence thereof we are involved in some difficulty in determining how much of the case is opened by this appeal.

The first question presented by the statement of the case, as appears by the record and proceedings, is this: Is the decision of the Court of Appeals of the Territory of Florida, given at January term, 1838, upon an appeal then pending from an order in this cause, obligatory upon this court, so far as to *confine* this court to a review of proceedings *subsequent* to the mandate of that court, or whether this court can go behind that mandate and the decree of the Superior Court affirmed, and render a decree according to its own view of the merits of the case? This leads us to inquire how the decree of 1834 by the Superior Court, and the decree of the Court of Appeals of 1838, affirming in part said decree, are to be reviewed. If they are together a *final* judgment in the cause, then this court will be estopped from going behind the mandate of the Court of Appeals, however much we may differ as to its provisions. *Bret vs. Ming*, 1 Florida, 454.

In determining whether these two decrees are together a *final* decree, we are led, from the view which this court takes of them, to inquire:

1st. Whether the Court of Appeals in 1838, under the laws then in existence, had jurisdiction of the cause, and whether their adjudication is not altogether *coram non judice*.

2d. Whether, admitting the Court of Appeals had jurisdiction, their decree, together with the decree of the Superior Court, is anything more than an interlocutory decree,

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and examinable by this court like all other interlocutory decrees, and whether the last decree (that of Judge Douglas) in this case was the final decree.

In examining the first question it will be borne in mind than when that appeal was taken there was no statute of Florida authorizing appeals from interlocutory decrees as there now is, but the law was: "*That if a party in either of the Superior Courts of this Territory shall feel aggrieved by a final judgment, sentence or decree, made or pronounced by any or either of said Courts, it shall and may be lawful for such party, &c., to obtain an appeal to the Court of Appeals,*" &c. See Duval's Compilation, page 108.

From this it will be seen that to give the Court of Appeals jurisdiction and give their acts validity, it was necessary that the decree of the Superior Court appealed from should have been a FINAL decree.

What is a "FINAL decree?" Blackstone, in his Commentaries, says: "It very seldom happens that the first decree can be final, or conclude the cause." In speaking of things which retard the completion of decrees, he says: "Frequently long accounts are to be settled, incumbrances and debts to be inquired into, a hundred little facts to be cleared up, before a decree can do full and sufficient justice. These matters are always, by the decree on the first hearing, referred to the Master in Chancery to examine, and then he is to report the facts, as they appear to him, to the court. This report may be excepted to, disproved and overruled, or otherwise is confirmed and made absolute, by order of the court." 3 Black. Com. page 353.

"A decree is *final* when all the circumstances and facts material and necessary to a complete explanation of the matters in litigation are brought before the Court, and so fully and clearly ascertained BY THE PLEADINGS on both sides that the court is enabled from THENCE to collect the respective merits of the parties litigant, and upon a full considera-

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tion of the case made out and relied upon by each, determines between them according to equity and good conscience.”

“A decree is *interlocutory* when it happens that some material circumstance of fact, necessary to be made known to the court, is either not stated in the pleadings or so imperfectly ascertained by them, that the court, by reason of that defect, is unable to determine FINALLY between the parties; and therefore a reference to or an inquiry before a Master,” &c. 1 Harrison’s Ch. Pr., page 420.

“But a decree is *final*, in the sense of the rule, which finally adjudicates upon all the merits of the controversy, and leaves nothing further to be done but the execution of it.” Story’s Equity Pl., § 408.

It is said by Judge Spencer, in Jaques vs. Methodist Episcopal Church, 17 Johnson, 558, that no case can be found in which a decree directing a reference to a Master, or a feigned issue, for the purpose of ascertaining any *material fact* in the case, has been held to be a final decree.

A decree to refer is not *final*. There must be a report and a final decree upon it. 10 Vesey, 34; 2 Cranch, 33.

It is true the decree of the Superior Court does not direct the Master to report; but it does reserve questions until the coming in of the report; to wit, the disposition of so much of said sum and amounts as have not been paid. But does this dispense with the necessity of a report of confirmation of the report?

It seems it was thought necessary to have a report and confirmation of it, as Judge Douglas required, before he would enter a final decree in the Circuit Court.

This reference to the Master was not merely to calculate interest or state an account upon *fixed data*. On the contrary, he was to “ascertain the *amount still due and unpaid*, with the INTEREST thereon, up to the date of this decree, *and all sums due and owing by said complainants as afore-*

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said contracted BEFORE THE 14TH JANUARY, 1829.” He was also to ascertain “the *amount paid* under the judgment of the County Court and in said Justice Hogg’s Court.”

If this is not a reference for the purpose of ascertaining material facts, we are at a loss to define what would be one. If the report of the Master, on ascertaining these facts, does not require confirmation before final decree, we cannot conceive a case that would require it. Again, from what source was the Master to ascertain “*the amount so paid under judgments of said Court,*” &c., &c.? Was he to gather this from the pleadings? Were these facts “fully and clearly ascertained by the *pleadings* on both sides, that the Court was enabled from *thence* to collect,” &c.? No. It does not appear from the *pleadings* that any debts were paid by said Orman & Young. On the contrary, their payment was made after the original bill was at issue, and was made known to the court by proofs and not by pleadings. Being imperfectly ascertained, the court referred the cause to a Master.

It follows as a matter of natural consequence that the Master was to make special report of these things to be confirmed, before a final decree, and it certainly is the practice. See 2 Smith’s Ch. P., 359.

In Scott vs. Livesey, Eng. Chan. Rep., vol. 1, 467, it is laid down that wherever exceptions will lie to the Master’s report, it must be regularly confirmed before any order can be made upon it. A report approving a conveyance after order for sale is the only exception.

This decree further directs that the partnership property received by said Sewall, or which was purchased or acquired with the partnership funds, (not stating in the decree any property, real or personal, thus received or acquired,) be in the first instance applied to the payment of the sums decreed. Execution is by the decree awarded to the *complainants*, and directed to be levied on said property, (no where

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specified or described,) so as to raise the amount due complainants (when ascertained.)

We are aware of the length to which the Supreme Court of the United States has gone, in defining the properties of a final decree, so as to admit of an appeal, and some of the provisions of this decree import *pro tanto* finality, according to those tests. But when we consider that material facts were referred to the Master to ascertain; that the further order of the court is reversed; and that the decree does not specify the property, the *rem*, to be sold, on which the alleged *lien* did attach, it will be seen that those tests will not work this into a *pro tanto* final decree. *Young et al. vs. Smith et al.*, 15 Peters, 287. The decree was incapable of execution without some further action of the Court. Could the Court of Appeals have provided a final decree in the cause before it? It certainly could not, and *it did not*, as will be seen by reference to it. Although they provided for execution and sale, no property was specified, and they sent the case back to the court below, with the same reference to Master as to amounts paid; and in the opinion of the Court of Appeals—see page 100 of printed record—the court say:

“The Master should have been directed to make his report to the court, so that the appellant might have had an opportunity of taking such exceptions to it, if any there were, as would have been legal and proper *before a final decree was rendered* upon which execution would issue.”

In the case of *Putnam vs. Lewis and wife*, 1 Florida, 474, our own court decided a decree for partition of land, which was made by consent, and all the equities between the parties settled, the quantity of land each claimant was entitled to defined, but which appointed commissions to make partition of the land in conformity thereto, to be an interlocutory decree. That case does not present equities unsettled and material facts unascertained, as does the one we are now

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considering. See also Bellamy et al. vs. Bellamy, 4 Florida, 243.

Thus it will be seen that neither our own nor any of the other decisions would sustain us in holding the decree of the Superior Court in 1834 a final decree. It not being a final decree, the Court of Appeals acted prematurely, and the cause was never properly in the Court of Appeals.

Supposing, however, the Court of Appeals had jurisdiction, what is the character of their decree? Was it a final or interlocutory decree? From the rules and tests we have already laid down, there is no question but that it was an interlocutory decree, continuing the reference as to specified portions thereof affirmed, and calling for the report of a Master, confirmation thereof and entry of final decree thereupon by the court below.

As a case is now up again before a Court of Appeals, can this court revise and reverse the former ruling of the Court of Appeals?

We have already decided that there has been no final decree in this cause, excepting the one now appealed from, to wit: the decree of the court in 1846 by Judge Douglas.

This court, having jurisdiction of the cause, on an appeal, and there being no final judgment, the whole case is open for consideration on the merits connected with the decree from which appeal is taken, and this, too, notwithstanding the interlocutory decree of the Superior Court was in part affirmed by the Court of Appeals, which was done in the case of Price, Executors, vs. Nesbit, 1 Hill's Chancery Reports, (South Carolina,) page 454, under principles cited in said case, and also in Jaques vs. Methodist Epis. Church, 17 Johnson, 549.

Having decided that the opinion of the Court of Appeals, and its decree in 1838, is not obligatory upon this court, and that the last decree (that of Judge Douglas) in this case was the final decree, the next question is whether

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there was error in the preceding interlocutory decrees connected with the merits of the final decree.

By the partnership articles, Orman & Young and Sewall agree to enter into partnership for two years in the mercantile line. • The business to be done under the name, style and firm of "Orman & Young."

Of course, under this agreement, all contracts by and with the firm, within the legitimate sphere of their business, although under the name and style of Orman & Young, Sewall, the dormant partner, is bound for and liable at law, if he shares the profits thereof. 9 Pickering, 272; Livingston vs. Roosevelt, 4 Johnson, 267; Beckman vs. Drake, 9 Meessen & Welsby, 92; Saville vs. Robertson, 4 T. R., 725; Armstrong et al. vs. Hussey et al., 12 Sergt. & Rawle, 317.

It appears in this that the contracts and notes were made in the firm name, "Orman & Young." Therefore Sewall could be joined with the acting partners in an action at law, and the plaintiff could aver in his declaration that Orman, Young and Sewall composed the firm of "Orman & Young." Loyd vs. Ashby, 2 B. & Ad., 23; 5 Peters, 562.

If Orman & Young, on being sued alone, desired to have Sewall joined with them, they should have plead the non-joinder, as was their duty.—11 Richardson's Law Rep., 484.

There are conflicting rulings whether the acting partners alone being sued on a note, could plead the non-joinder of the dormant partner; but where he was known to the creditor at the time of the contract, there is no question but that a plea in abatement would be sustained, because he put faith in him also.—Dubois vs. Subert, 5 Taunt, 609; DeMautort vs. Sanders, 1 B. & Ad., 398.

Orman & Young having suffered judgment against themselves alone, and the creditors, with the knowledge that Sewall was a partner, having taken their judgments in this manner, the recovery should be treated as a recovery on a

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several contract, and not as a bar to Sewall.—6 Cranch, 253; 11 Richardson, 484.

Was there anything to inhibit the creditors from using all the partners at law?—Sewall was bound *in extenso* as well as Orman & Young. Was there anything to prevent them from suing Sewall even after their judgment?—A judgment against the two partners, Orman & Young, would be no bar to an action against all three of the partners.

In the late case of the Union Bank vs. Hodges & Smith, 11 Richardson's Law Rep., 480, assumpsit was brought on a note, signed "A & B," payable to their own order, and endorsed by them, and judgment recovered. Afterwards, the plaintiff finding that C was a *dormant* partner, sued all three upon the note. A & B pleaded a former recovery, but the Court of Appeals overruled the plea.—See, also, Sheehy vs. Mandeville, 6 Cranch, 253; Watson, Crews & Co. vs. Henry Owens & Co., 1 Richardson's Law Rep., 111.

There is no allegation or proof that any of the members of the firm was insolvent at or since the institution of the suit; and suppose any or all were insolvent, still they could be sued at law and the creditors could not enter the Court of Chancery till they had first obtained a judgment at law and got a return of *nulla bona* on the *fi. fa.* Yet, by the decree in this cause, Orman & Young are substituted for the creditors and given a standing in equity against Sewall, reaching his property which they had sold him, a position that the creditors themselves could not have maintained, enforcing judgments against Sewall to which he was not a party, giving as a reason for this substitution that, although Orman & Young took the bond of Sewall, with SECURITY, to pay the debts of the firm, nevertheless Orman & Young were sued alone by the creditors and paid debts under the judgments, and that no recovery could be had against the secret partner Sewall *at law* by the creditors.

But, it is contended by counsel for appellee that the credi-

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tors had a lien upon the partnership property and the property purchased with the funds of the firm for the payment of their debts. What lien had they? When they sold goods to the firm or Orman & Young and delivered them, their lien was gone, the contract was executed on their part, and just as soon as Orman & Young gave their note or promise, it was complete on their part—nothing remained but to pay the money. And who was bound in law to pay it? The firm, Orman, Young & Sewall. They had, when they recovered judgment, lien upon any property which was subject to the execution thereupon, the same as any other person on judgments for property sold, but they could not reach property in equity until they had exhausted their law process. The creditors had nothing to do with the bond given by Sewall to Orman & Young. That was Orman & Young's *indemnity*—their *security*. That security could be enforced by them.

In view of the facts, what was this substitution? It was substituting Orman & Young in the place of the creditors against Orman & Young—certainly an anomaly. To do what? To use the executions of the creditors of the firm issued upon judgments in which Sewall was no party and subject the property sold by them to Sewall in payment thereof. The facts of this case do not warrant any such subrogation or substitution. It is inapplicable. The equitable doctrine of subrogation or substitution can only be resorted to, says Chancellor Walworth, “in cases where the person advancing money to pay the debt of a third party stands in the situation of a SURETY, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor as a matter of course without any agreement to that effect.”—Sanford vs. McLean, 3 Paige, 117; 40 vol. Law Library, pages 92, 101.

In what way did Orman & Young stand as *surety* for Sewall with the creditors? Whose creditors were they? Were

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they not the creditors of Orman & Young? Did they advance money to pay the debt of Sewall? No, they advanced money to pay their own debt as well as Sewall's. It is true that Sewall had agreed with them, Orman & Young, to pay these debts, and given his bond and security to that effect, but no arrangement had been made with the creditors. They had not taken him as principal and Orman & Young as *surety*. We have already seen that nothing in the pleadings and proof show that they were compelled to pay the debts to protect their own rights. Had they plead the non-joinder of Sewall in these suits, they would have had his property equally liable with their own; or, as they *paid* debts, they might, by suit for breach of the bond, have attached Sewall's property. Had Orman & Young taken no bond or promise from Sewall that he would pay the debts, then, on payment, they would have been entitled to contribution; but they sold and delivered the effects of the concern to Sewall, and took his *bond* and *security*, and executed a conveyance with *warranty* against their claim. The effects by the sale became his, and he could dispose of them as he thought proper.

The creditors are not parties to this suit. There is no allegation that either Sewall or Orman and Young are *insolvent*, nor are the creditors seeking to show collusion or fraud, yet the Court substitutes Orman & Young for them and fancy that the creditors had and have a *lien* on the partnership property notwithstanding the sale to Sewall.

This leads us to consider the doctrine of the creditors' so *called* lien on partnership effects. During the continuance of the partnership the joint creditors have no lien. The nearest they approach it is a right to sue at law and subject the property.—*Ex parte* Ruffin, 6 Ves., 126; 11 Ves., 5.

But until then they cannot prevent the partners from effectually transferring the partnership property by *bona fide* sale, and if sold *bona fide* joint creditors cannot follow it.

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Campbell vs. Mullott, 2 Swanston, 576; 16 Vesey, 347; 1 Maddock, 533.

The Master of the Rolls, in delivering his opinion in the case in 2 Swanston, says: "The circumstance of its having been joint property does not render it such forever, *or prevent its being effectually aliened to two or one of the partners.*" This is the case now under consideration. See this doctrine summed up in Story on Partnerships, sections 358, 359, &c.

In section 359, says Story: "The reason is, that in such a case the retiring partner who so transfers his share has *no lien* on the property for the discharge of those debts; *for by his voluntary transfer thereof he has parted with it and trusted to the personal security and personal contract of the other parties.*" And in Section 360 the commentator says: "And it is thus through the operation of administering the equities between the parties themselves that the creditors have the opportunity of enforcing this *quasi lien.*" Thus it will be seen their *agreement* will be enforced according to the equities between the partners. This is irrespective of any provisions of the statute of King James.

It is contended by the counsel for the appellee in support of the decree that said Orman & Young had an equitable lien upon the partnership property for the amounts which they paid for the firm, and therefore the misapplication of the principle of *substitution* to this case is not fatal to the decree.

There is no doubt, as a general principle, that each of the partners have a specific *lien* on the partnership stock not only for the amount of his share, but for monies advanced by him beyond that amount for the use of the co-partnership, and that this lien extends to property purchased with the partnership funds as well as that standing in the partnership name.

This lien would be enforced if the partners had not entered into an *agreement* that the partnership stock should

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become the exclusive property of one of them (Sewall), and that Sewall should pay all the debts, and for security that he would do so, an indemnity bond taken. *Lingen vs. Simson*, 1 Sim. & Stu. Rep., 600.

It will be borne in mind that the partnership property was not left in the hands of Sewall to pay the debts with, he assuming a trust. On the contrary, the same is *bona fide* sold to him. A conveyance to him is executed by Orman & Young, in which they covenant to warrant and defend him against their claim. The partnership is dissolved—a final settlement made—a sum of money paid—an agreement entered into between the partners, in which the creditors are not parties that said Sewall, as a part of the purchase money, will pay all the debts, not specifically out of the partnership property, but that he would pay them, and as indemnity against their suffering damage, he executed a bond with security. The fact of taking this bond, with security, and the fact of the other party covenanting to warrant and defend against their claim, seems to us conclusive that it was the *intention* of the parties that the effects assigned to said Sewall should be appropriated to his *private use*. Orman & Young admit this in their answer to the cross bill. They say that if they had known how much embarrassed Sewall was they would not *have sold to him*.

The case of *Deveau vs. Fowler*, 2 Paige, 401, cited by counsel for appellee, is a strong case, and at first view would seem to clash with the English decisions and Judge Story, that an assignment of the partnership effects by one partner to another is a destruction of the lien. And so with some of the other cases cited. But it will be seen that all the Chancellor decided in that case was, that the partnership property should be applied in the *manner stipulated in the agreement*, and in the opinion the language of the Chancellor is: "The fair presumption, in the absence of any *express agreement* to the contrary, therefore is, that it was not the

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intention of the complainant that the effects assigned to the defendant should be appropriated to the private use of the latter, leaving the debts of the firm unpaid.”

In the case of Vendor's lien, where *security* is taken, the presumption of law is that the vendor waived his lien, and relied on the security, and so it has been held by our court. See Marvin vs. Bradford, Admr., 2 Florida Rep., 463. So in this case, the taking of *security* must be presumed a waiver of the lien, or at least an expression, *prima facie*, of the *intention* that the effects assigned should be appropriated to the private use of the purchaser.

The weight of authority seems to be, in America as well as in England, that partners may effectually transfer their joint property to one another by *bona fide sale*, and that such a sale destroys the lien.

We think in this case that Orman & Young did make such a sale to said Sewall, in consequence of which the property is not still the property of the partnership, and therefore the decree is erroneous, and should be reversed and set aside.

The appellant, by his attorney, claims that the decree in the court below should have been for defendant, dismissing complainant's bill.

This objection to the jurisdiction of the Court comes too late, in any event.

The appellant submitted to the jurisdiction of the court by answering the bill, filing cross bill, and then moving to dissolve the injunction. He should have demurred to the bill, if he wished to contest the equity in it. Grandin vs. Leroy, 2 Page, 509; 2 John Ch., 339; 4 John. Ch., 287.

We think, however, the Court did not err in retaining the bill, irrespective of the fact that it was answered.

What was the nature and objects of this bill? It was a bill of *quia timet*, and for specific performance of an indemnity bond.

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Blackstone, in his Commentaries, says a Court of Equity may entertain a bill of *quia timet* for the purpose of preventing a possible future injury, and thereby quieting men's minds and estates, &c. 3 Black. Com., 331; 2 Story's Equity Jurisprudence, § 826.

And in the case of *Champion vs. Brown*, 6 Johnson's Chancery, 06, it was decided that equity may decree the performance of a general covenant of indemnity, though it sounds only in damages. 1 Fonblanque, 43, and note; also, see *Ranlaugh, vs. Hayes*, 1 Vernon, 189; 4 Dessausure, 44.

What is a covenant of indemnity? In 2 McCord, 279, the court define "indemnity" to be "what is given to a person to prevent his suffering damage."

We think the bond in this case contains a general covenant of indemnity, and sounds only in damages, and comes within the jurisdiction of a Court of Equity, and unless the bond is set aside or cancelled, the Court below, under this bill, should decree a specific performance thereof, and in enforcing the decree may execute it on any property belonging to the estate of Sewall which may be found applicable for that purpose. We think that there is enough stated in the bill to call upon the defendant to answer.

We are also of the opinion that the Court below erred in sustaining the plea to the cross bill and dismissing it.

This cross bill was filed for the express purpose of relief against the bond and agreement which is endeavored to be enforced by the original bill. It charges fraud, concealment, misrepresentation and imposition on the part of the obligees. Its prayer is that the bond be annulled and given up, and the agreement entered into between them for the adjustment of the partnership concern be set aside and held for naught.

Chancery may order an instrument to be delivered up to be cancelled, whether it is or not void at law, and whether it be void from matter appearing on its face, or *from proof*

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taken in the cause. Hamilton vs. Cummings, 1 John. Ch., 522, and cases reviewed.

The grounds upon which a Court of Equity will grant relief against agreements and bonds founded in fraud, imposition and misrepresentation, are well defined in all our text-books. We are at a loss for what reason the court below refused to enter into the equity presented by the cross bill, answer thereto and proofs taken under the same, and sustained the plea setting up the *very* bond and agreement, against which relief was sought, as an estoppel.

This case of *antiquity* has dragged its length through a series of judicial changes, and gladly would we arrest its career, but we think the ends of justice require that the cross bill be reinstated, the judgment of the court below sustaining the plea of estoppel vacated and the cause remanded to the Court below, to enquire from the proofs taken or to be taken in the cause whether the relief prayed for in said cross bill should be granted.

Under the general powers granted by the Legislature, this court might upon the record make such a decree on the original bill, cross bill and supplemental bill, which are set down for hearing *together*, as the court below should have made, but it is to be considered that the Constitution of our State makes us an Appellate Court *only*. The court below not having passed upon the relief prayed for in the cross bill, we think it would be exercising a doubtful jurisdiction for this court to act upon it until that is done. Besides, the parties may now desire to take further testimony. The court below might, upon application, if thought proper, open the case again for further testimony.

If, upon a hearing of the cause below, the Court should be of the opinion the agreement should be annulled and the bond delivered up to be cancelled, then it will be a matter of account and *contribution* between the parties.

If, however, the court below should refuse the relief asked

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in the cross bill and sustain the bond and agreement, then it will treat it as a bond of indemnity sounding in damages, and decree specific performance directing a reference to a Master to tax the damages and decreeing the administrator of said Sewall to pay the same within a reasonable time out of assets of the estate of said Sewall in his hands to be administered.

The decree of the Circuit Court is therefore reversed and set aside, and this cause remanded to the Circuit Court of Jackson county for such further and other proceedings and decree as that court shall deem right and proper, according to the principles of equity between said parties, conforming in said proceedings and decree to the instructions and principles laid down and established by this court in said cause, and that the appellant recover of the appellees his costs herein expended.

And it is further ordered that the Clerk of this court do prepare a transcript of this judgment, duly certified under his seal of office, and that he forward the same to the Deputy Clerk of this court at Marianna, with instructions to enter the same on the minutes of the court at that place as of the March term, 1860.

ALPHONSE LOUBAT, APPELLANT, vs. KIPP & YOUNG, EXECUTORS, &C., APPELLEES.

1. A deed will take effect only from the date of the *delivery*, actual or constructive.
2. Where a deed of mortgage was delivered to a third person, to be kept by him during the pleasure of the mortgagor, and subject to his further orders :
Held that it was not an *Escrow*, and that the third person was a mere depositary.

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3. It is essential to the character of an Escrow that it be delivered to a third person, to be delivered to the obligee or grantee upon the happening of some event or the performance of some condition by him.
4. It is not a universal, or even a general rule, that the doctrine of *relation* attaches to instruments of this character. It is only allowed in cases of necessity, to avoid injury to the operation of the deed, from events happening between the first and second delivery.
5. Where an attachment was levied upon the real estate of an absent debtor, and he dies pending the suit and before final judgment: *Held* that in a contest between a mortgagee (seeking to foreclose a mortgage on the same property which was executed after the date of the levy) and the purchaser, under the judgment obtained in the same suit against the administrator, the lien of the attachment survives, and the purchaser will be protected in his title.
6. But whether such lien survives, so as to prevail against a *creditor*, who is seeking to obtain payment of his debt, under the preference given by the statute—*Quære?*

This case was decided at Tallahassee.

Appeal from Leon Circuit Court.

For the facts of the case, reference is made to the opinion of the Court.

W. G. M. Davis for appellant.

M. D. Papy for Appellees.

DUPONT, C. J., delivered the opinion of the Court.

The bill in this case was filed by the appellees, as executors of the last will and testament of Charles Trinder, deceased, against the appellant and divers other individuals, and sought the foreclosure of a deed of mortgage, alleged to have been given by one George L. Middlebrook in his life time, but then deceased, to secure the payment of a debt due by note from the said Middlebrook to the said Trinder, the testator of the said appellees.

The material allegations of the bill are, that Middlebrook, on or about the 18th day of June, 1838, made his promissory note in writing, and thereby promised to pay to Trinder or order, sixty days after the date thereof, five thousand dollars, at the North River Bank, in the city of New York

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which note is alleged remained unpaid at the time of the decease of Trinder, who died in the month of July of the same year; that after letters testamentary had been issued to the appellees, Middlebrook, for the purpose of securing the payment of the note, executed and delivered to them a deed of mortgage, embracing certain real estate situated in the city of Apalachicola, in this State, bearing date the 7th of March, 1840, and which was duly recorded on the 7th day of October of the same year; that after the time limited in the deed of mortgage for the payment of the note had fully elapsed, Middlebrook departed this life, leaving the same unpaid, and leaving a widow and three children surviving him, who are all made parties defendant to the bill; that Augustus Leftwitch, Alphonse Loubat, Nathan Baker and David G. Rainey (all of whom are made parties defendant) pretend to have some interest in the mortgaged premises; and the bill, among other things, prays that they may be compelled to disclose their respective titles, and then closes with the usual and appropriate prayer for the foreclosure of the mortgage.

The appellant, Loubat, is the only one of the defendants who has answered or who makes any resistance to the foreclosure, except the minor children of Middlebrook, who are represented by a guardian *ad litem*, and have submitted their rights and interests to the protection of the Chancellor. The answer of Loubat sets up three distinct grounds of defence as follows, viz: First, that the demand is *stale*; second, that the demand was not presented to the administrator of Middlebrook within the two years prescribed by the statute; and, third, that he is a *bona fide* purchaser for a valuable consideration, and without notice of the mortgaged premises from one who held as a purchaser under the *lien of an attachment*, which was levied prior to the date of the registration of the deed of mortgage. The answer also insists upon strict proof of the execution of the note and also of the execution and delivery of the deed of mortgage.

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The record discloses the following state of facts, viz: That on the 4th day of May, 1840, a writ of attachment was sued out of the Superior Court of Franklin county, at the suit of the Bank of Pensacola against George L. Middlebrook, and *levied* on the same day upon the premises embraced in the deed mortgage; that on the 17th day of April, 1841, the defendant Middlebrook's death was suggested upon the record of the court and an order taken for a *sci. fa.* to make parties; that on the 16th day of March, 1842, the *sci. fa.* was issued to Harvey Williams, then Sheriff of Franklin county and *ex-officio* administrator of Middlebrook, and was duly served on the next day, and he was thenceforward held as the defendant to the suit. It further appears that the judgment was duly entered against the *ex-officio* administrator on the 29 day of March, 1842, and that the writ of *fi. fa.* was issued on the 28th day of April, 1842, which was levied on the same day and the premises sold by the Marshal on the 31st day of May, 1842, at which sale Messrs. Nourse & Brooks became the purchasers of the premises in question for the sum of \$1,700. It is under this sale to Nourse & Brooks that Loubat, the appellant, seeks, through divers mesne conveyances, to protect his title as against the lien of the mortgage now sought to be foreclosed.

The record discloses the further fact that the deed of mortgage bears date as of the 7th day of March, A. D. 1840, about two months *prior* to the levy of the writ of attachment, but that it was not admitted to record until the 7th day of October, or about five months after the levy had been made and duly entered upon the writ.

From the view which we have taken of the facts of this case, and of the law bearing thereon, it becomes unnecessary to notice the two first grounds of the defence set up by defendant Loubat in his answer to the bill of the appellees, viz: the staleness of the demand and its non-presentation to the administrator within the two years prescribed by

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the statute of non-claim. Our investigation will be confined to the consideration of the deed of mortgage with reference to its validity and the extent and compass of its operative effect, and, secondly, the priority of lien as between the attachment process and the deed of mortgage.

The deed of mortgage seems to have been prepared with much care and contains all the formal requisites necessary to pass to the mortgagee whatever interest the mortgagor should be found to have had in the mortgaged premises. It is settled, nevertheless, that however perfect the deed may have been in its formal parts, yet it did not begin to operate until it had been fully executed by a *delivery*, actual or constructive. Hence the necessity of adverting to the evidence to ascertain that date. The only evidence on the point is to be found in the disposition of R. J. Floyd, Esq., the attorney who prepared the deed, and who was also a subscribing witness to the execution of the same. In his answer to the third direct interrogatory he says: "The deed was left after its execution, in my possession, or placed there by George L. Middlebrook. It remained there from its execution until about the 7th of October. I finally forwarded it to the complainants, by mail, on the 8th day of October, 1840, by direction of Middlebrook or the complainants, I do not recollect which." In his answer to the 5th direct interrogatory, he says: "When he executed the mortgage, Middlebrook said he did it to secure the money to his wife. If he succeeded in compromising with his creditors, he did not wish it recorded; if he did not succeed, he would write to me and wished it recorded. He said he intended this to operate as a good and valid mortgage from its date, provided he did not settle with his creditors." In his answer to the 6th direct interrogatory, he says: "The deed was left with me by Middlebrook, for what purpose I don't know, except to allow him time to settle with his creditors. I was to have it recorded whenever he wrote to me. I did promise to obey

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his directions.” In his answer to the first cross-interrogatory, he says: “I did not know the plaintiffs Kipp & Young; had nothing to do with them. Middlebrook left the deed with me subject to his order.” And, in answer to the 2d cross-interrogatory, enquiring if he would have delivered the deed to Kipp & Young, he says: “I don’t think I would, under the instructions given by Middlebrook. I would not have delivered it to anybody. His instructions were not to deliver it or record it until he wrote to me.”

From the evidence of this witness, whose testimony was taken by the complainants in the bill, it is very evident that the deed of mortgage was not delivered at the time that it bore date, but that the *instruction to deliver* was given some time after that date, and that the actual delivery did not transpire until the 8th day of October. At what particular date this instruction was given is also left in doubt, and, as the ascertainment of that date is of importance in determining the rights of the parties, we must approximate as near to the fact as the evidence will conduct us. In answer to the 7th direct interrogatory, which enquires with regard to the length of time that Middlebrook remained in Apalachicola after the date of the deed, the witness says: “He left some time in April or May for the North, intending to return; he did not return.” And, in answer to an interrogatory as to how long after the date of the deed he, the witness, remained in Apalachicola, he says: “I did not remain; I left some time in May or June, and returned in last of September or first of October.” By the aid of this evidence, we are enabled to ascertain with tolerable precision the limit of time within which the instruction was given by Middleton to Floyd to deliver the deed; for, in his answer to the 10th direct interrogatory, he says: “I did receive instructions by mail at Apalachicola to have the mortgage recorded and forwarded to the complainants. I received

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them soon after my return.” Now it is shown that he left Apalachicola in May or June, and the presumption is strong that it was about the *last* of May, and that he did not return prior to the last of September, so that the date of the instruction for the delivery of the deed could not have been given *before the levy* of the attachment, which was made on the 7th day of May, 1840. This being established, it follows of course that unless the operative effect of the deed can be made to relate back to the date of the instrument, the lien of the attachment would override the lien of the mortgage, unless something had supervened to destroy that lien. With regard to the doctrine of relation, we are inclined to think that it cannot be made to operate unless the deposit of the deed with Floyd can be viewed in the light of an *escrow*. But was such the character of the instrument while in the custody of Floyd? Judge Blackstone explains the nature of an *escrow* thus: “A delivery may be either absolute, that is to say, to the party or grantee himself, or to a third person to hold until some conditions be performed on the part of the grantee, in which case it is not delivered as a *deed* but as an *escrow*—that is as a scroll or writing, which is not to take effect as a deed till the conditions be performed, and then it is a deed to all intents and purposes.”—2 Black Com. 307.

Now, it will be noticed that to constitute this instrument an *escrow*, it was necessary that some condition must have been stipulated to be performed *by the grantees, Kipp & Young*. But was such the case? So far from this, Floyd expressly says: “I did not know Kipp & Young, and had nothing to do with them. Middlebrook left the deed with me, *subject to his own order*.” It will thus be perceived that this instrument lacked the most essential requisite of an *escrow*, viz: *a condition to be performed by the grantees*. In fact, this was but an inchoate deed, wholly inoperative for any purpose whatsoever until Floyd had received instructions from Middlebrook to deliver it to the grantees.—

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James vs. Vanderheyden, 1 Paige, 385. From the date of that instruction there was a constructive delivery which consummated the execution of the instrument and imparted to it vitality. Until that instruction was given the execution was incomplete, and the deed remained imperfect and subject to the exclusive control of the grantor, and might have been revoked and annulled at his will. But even admitting that this instrument is to be recognized as a valid *escrow*, still it does not follow that its operative effect is to have relation back to the first delivery to Floyd, which is proved to have been contemporaneous with its date; for it is not a universal or even a general rule that the doctrine of relation attaches to instruments of this character. It is only allowed in cases of necessity, to avoid injury to the operation of the deed from events happening between the first and second delivery. For example, when a *feme sole* makes a deed and delivers it as an *escrow*, and then marries before the second delivery, the relation back to the time when she was sole is necessary to render the deed valid.—1 Bouv. Law Dic., 370.—*Escrow*.

This brings us to the consideration of the second point in this connection, viz: whether any matter, had supervened since the levy of the attachment which either in law or in fact, had destroyed the lien of the attachment?

It was insisted for the complainants that the death of Middlebrook, occurring between the date of the levy under the attachment and the rendition of final judgment against his administrator, operated a dissolution of the writ of attachment and the consequent abatement of the lien acquired by that levy, and to support that position we have been referred to the ruling in the case of Swearingen vs. Administrators of Eberins, 7 Missouri Reports, 421. That was an action of *assumpsit*, commenced by the levy of an attachment. After the commencement of the suit, and before the rendition of final judgment, the defendant died, and after his death his

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administrator appeared to the action and pleaded the general issue, and upon trial, judgment was rendered for the plaintiff in attachment, and execution awarded thereon. A *special* execution was issued against the attached property, and at the return term the administrator moved the court to quash the writ of *fi. fa.*, which was done. In the course of the opinion delivered by the court, it is held that the lien of the attachment was lost by the death of the defendant before final judgment, but it is very manifest from the whole reason of the court that the conclusion announced so generally, was mainly based upon a consideration of the administration laws, which directed the order in which the debts of decedents should be paid, and we are therefore constrained to conclude that the character of the parties and the relation in which they stood to each other in the suit, as creditor and debtor, exercised a controlling influence in conducting the court to the conclusion arrived at. Nor are we inclined to dissent from the conclusion in that particular state of case, unless, indeed, a distinction may be made in favor of a judgment obtained against the administrator himself, (about which we express no opinion.) From what is said in the opinion delivered in the Missouri case, it seems that they had in that State statutes directing the administration of assets, and the order in which the debts should be paid, similar to our statutes on the same subject, and in a contest before us between the creditors of the estate, or between a creditor and the administrator, we are not prepared to say that we ought not to come to the same conclusion as that arrived at in the case cited. But the case presented for our adjudication is not a contest between the creditors; neither is it one between a creditor and the administrator, seeking to obtain a preference in the payment of his debt out of the assets of the estate. This is a contest between *purchasers*—each standing upon the strength of his own title, as much so as though they were now litigating that title in an action of

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ejectment. To permit the ruling in a case, where creditors are contesting for a preference of payment, to prevail in a case like this, would be quite illogical, and might conduct to incalculable mischief. Suppose, for instance, that Middlebrook, instead of having executed a deed of mortgage to Kipp & Young, had given them a deed *in fee* to the premises in question. Now, under the view which we have taken of the *delivery*, the deed would not have been fully executed, and consequently not operative until after the date of the levy of the attachment, which created a *perfect lien* upon the property attached from the date of that levy. But the defendant dies, and with him dies the prior lien of the attachment. Here the death of the defendant is made to operate as not only to defeat the *prior* lien of the creditor, but to give to the purchaser a larger interest in the premises than the grantor possessed at the date of his purchase. A result so much at war with right and justice cannot be law.

The propriety of the distinction which we have made with respect to the nature of the contest will be readily perceived by adverting to the rights, duties and responsibilities of an administrator acting under our statute. The statute prescribing the order in which the debts of the estate are to be paid was clearly intended as an instruction to the administrator, and for his protection in the performance of his duties. Under that statute any creditor of the estate may demand the payment of his debt *in the order pointed out*; but if the administrator pay an inferior or postponed debt, it will hardly be seriously insisted that the creditor of the preferred class can recover the amount so paid from the party who has been thus paid. If there be any remedy against him, it certainly is not at the suit of the creditor of the preferred class; his only remedy is against the administrator and his sureties. But to demonstrate more fully the want of analogy between this case and that of a creditor pressing his right to preference in the payment of his debt, we re-

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mark, that however true it may be that under the operation of our statute the lien of the attachment acquired in the life time of the debtor gives to the attaching creditor no preference over his co-debtors, after the death of the common debtor, yet it is admitted law that if the administrator of the estate either himself sell, or allow to be sold, under a judgment obtained against him as administrator, the property of the estate, to pay the debt belonging to a postponed class, the purchaser's title will be good, and the creditor of the preferred class cannot disturb him. His only remedy in case of a deficiency of assets is against the administrator and his sureties for a *mal-administration*.

The case of Kennedy vs. Raguet, 1 Bay,, 484, and Fitch vs. Ross, 4 Serg. & Rawls, 556, cited by the counsel for the appellant, have afforded us but little light in this investigation, controlled as they were by the local statute. The very paucity of authorities brought to the attention of the court shows that this is one of those cases which must be determined rather upon principle than precedent. We have maturely considered the positions assumed by the counsel on either side, and have been constrained to view the contest between the parties as one of title only, and viewing it in this light, the court is of opinion that Loubat's title, having relation back to the levy of the attachment, must prevail over the deed of mortgage, which, as has been seen, did not commence to operate until the delivery by Floyd, which delivery was at a date subsequent to the date of the levy. It is therefore ordered that the decree of the Chancellor be reversed and set aside, and the cause be remanded to the court below, with direction to have the bill dismissed. It is further ordered that each party shall pay his own costs, as well those accruing in this court as in the court below.

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GEORGE SINCLAIR, APPELLANT, vs. JOHN D. GRAY, APPELLEE.

1. Where notice under the statute (Thom. Dig., 343, § 1,) is given to the adverse party in a suit to produce books or papers, the regular time to call for the production is not until the party who requires them has entered upon his case before the jury, until which time the other party may refuse to respond to the notice.
2. Before the court will proceed to give judgment against a party failing or refusing to produce the book or paper demanded, it must be satisfied that the book or paper is in the possession or under the control of the party and that it is *material* to the issue.
3. Where the book or paper demanded is only a link in the evidence, the party giving the notice must show its *materiality* by the prior introduction of other testimony.
4. The provision of the statute (Thomp. Dig., 348) which dispenses with proof of the *execution* of bonds, notes, &c., unless the same be denied by the plea of the defendant under oath, does not apply to the *indorsement* or *assignment* of such instruments.
5. Where the defendant fails to tender a defense to any particular count of the declaration, the plaintiff is entitled to a judgment upon that particular count as for a default; but such judgment must be given by the court—it is not the subject of instruction to the jury.
6. It is a settled principle that none but a party holding the legal title to an instrument can maintain an action upon it in a common law court; and to obtain a recovery upon the same, he must establish such title by competent evidence.

This case was decided at Marianna.

Appeal from Franklin Circuit Court.

The appellant instituted his action of assumpsit by attachment against the appellee on an order or check, of which the following is a copy, viz:

ST. JOSEPH, May 17, 1840.

President of the L. W. and St. Joseph Railroad Company will pay to James Black, or order, one hundred and fifty-three dollars, and charge the same to account of

Your ob't serv't,

JOHN D. GRAY.

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James Black endorsed the said order to William Hawkins, and the latter endorsed it to the plaintiff Sinclair, as alleged in the declaration, which was in the usual form and which contained the common money counts. On the face of the order was a note of protest "for non-payment 8th October, 1840," by Hez. R. Wood, Notary Public.

The defendant pleaded the statute of limitations, which was withdrawn before the trial; also three additional pleas, in which he alleged, first, that the order or check sued on had never been presented; second, that it had never been protested, and, thirdly, that it had never been transferred or assigned by the drawee James Black to William Hawkins, or by Hawkins to the plaintiff.

At the first trial of the case, a non-suit was taken by the plaintiff, but at the same term leave was granted by the court to reinstate the case.

The record shows that afterwards the following notice was served on the defendant's attorney, viz:

"To John D. Gray, def't, or his att'y, T. J. Eppes, Esq:

"SIR: You will take notice that upon the trial of this cause in said court you will be required to produce the following paper writings, in possession of the defendant, which said writings are pertinent to the issue joined in this case, to-wit: the notice of protest made by Hez. Wood, Notary Public, the notice of non-payment and the notice of presentment, which said notices were served upon the said defendant by the said Hez. Wood, Notary Public, according to law.

D. P. HOLLAND, *Pltf's Att'y.*"

The record contains the following answer, made by the defendant to the above notice, viz:

"The said defendant objects to the notice within as calling upon him to prove a negative. Subject to this objection, he answers: First, that he has not in his possession, and never had, any of the papers and writings named and

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called for in within notice, and generally answering, he denies the right in law of the plaintiff to demand the same, &c.

JOHN D. GRAY,

by T. J. EPPES, *Att'y.*"

The action taken by the plaintiff on the trial and the instructions asked, appear in the following bill of exceptions, contained in the record:

"Be it remembered, that upon the calling of this cause upon the trial docket, the parties by their attorneys announced themselves as ready for the trial thereof, when and before a jury was called, the plaintiff by his attorney moved for judgment upon the ground that the defendant had not produced certain papers which by notice filed and served upon the defendant he was required to produce under the statutes in such case, &c., which motion the court overruled, holding that the statute authorizing such notice would be sufficiently complied with by the production of such papers upon the trial before the jury, and under this ruling the defendant had leave to produce such papers upon the trial when the jury should be empannelled or the opportunity to discharge himself, if he could, upon his answer to the notice. To which ruling of the Court the defendant by his counsel excepted.

"Thereupon a jury were empannelled, and the defendant moved the court for judgment upon the ground, as insisted by him, that the papers required by the notice to be produced by the defendant were pertinent to the issue joined, and that the answer of the defendant to the notice was insufficient and uncertain; which said motion was overruled, and thereupon the defendant by his counsel excepted to such ruling of the court.

"Thereupon the plaintiff produced James Penn, who testified that Hezekiah Wood had been dead some three years; that he died abroad, somewhere about Panama, and identi-

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fied the memorandum on the face of the draft sued on as the hand writing of the said Wood. Thompson the plaintiff by his counsel offered to prove by the said signature of said Wood, and by parol testimony, that the said Wood was a Notary Public of the Territory of Florida, residing at St. Joseph, in Florida. The Court ruled that the plaintiff must show the commission or appointment of the said Wood as a Notary Public, and that parol testimony was not admissible to prove the same, unless it should be first proven that the superior evidence of his authority to act as a Notary Public had been lost or destroyed. To which ruling of the court the plaintiff by his counsel excepted.

“Thereupon the plaintiff introduced H. D. Darden, a witness, who testified that the writing on the back of the draft sued on (other than the assignment) was in the handwriting of R. J. Moses, who he had seen acting as Secretary and Cashier of Lake Wimico and St. Joseph Railroad Company, but that he did not *know* that said Moses was the Cashier of said Company. Whereupon the plaintiff offered to prove by parol testimony that the said Moses was the Secretary and Cashier of said Company, and also offered to prove the same by the signature of said Moses to a deed purporting to be signed and sealed by him as Secretary or Cashier of said Company.

“The Court ruled, that the books of the Company must be produced to prove that said Moses was the Secretary or Cashier of said Company, unless the same were proven to be lost or destroyed, so as to let in secondary evidence of the fact; and the Court ruled out the testimony stated above as being offered by the plaintiff. To which ruling the plaintiff by his counsel excepted. Thereupon the plaintiff by his counsel asked the Court to charge the jury as follows, to-wit:

“1st. That it was not necessary for him to prove the assignment of the draft by Gray to Black, of Black to Haw-

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kins, or of Hawkins to plaintiff, in order to entitle him to recover in this suit upon the draft.

“2d. That inasmuch as there were no pleas to the money counts in the declaration that the plaintiff was entitled to recover.

“3d. That the draft sued on was evidence under the count in the declaration describing it as a promissory note.

“Which three several instructions, so asked for by the plaintiff, were refused by the court. To which refusal of the court to give such instructions the plaintiff by his counsel excepted.”

The jury returned a verdict for defendant, and plaintiff appealed.

D. P. Holland for appellant.

T. J. Eppes for appellee.

DUPONT, C. J., delivered the opinion of the court.

This was an action of assumpsit, commenced in the Circuit Court of Franklin county, by Sinclair, the appellant, against Gray, the appellee, upon an instrument of writing, as follows, to-wit:

ST. JOSEPH, May 17th, 1840.

“President of the L. W. and St. Joseph R. Road Company will please pay to James Black or order one hundred and fifty-three dollars, and charge the same to acct. of

“Your O. S., JOHN D. GRAY.”

This paper was endorsed by James Black, the payee, to William Hawkins, and by Hawkins to Sinclair, who instituted the suit, as endorsee thereof, and filed his declaration in the usual form. At the first trial of the cause, the plaintiff having failed to make out his case, took a non-suit, with leave to reinstate, which was allowed by the court. The defences to the action are embraced in the following pleas, viz:

1st. Non-presentation of the draft for payment.

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2d. That the draft was not duly protested.

3d. A denial of the transfer to the plaintiffs by endorsement.

A plea of the statute of limitation was also filed and replied to, but the record shows that this plea was withdrawn previous to the trial. It also appears that after the cause had been reinstated, and before the last trial, the plaintiff caused to be served upon the defendant's counsel the following notice, to-wit:

"To John D. Gray, defendant, or his attorney, T. J. Eppes, Esq.:

"SIR: You will take notice that upon the trial of this cause, in said court, you will be required to produce the following paper writings, in possession of defendant, which said writings are pertinent to the issues joined in this case, to-wit: the notice of protest made by Hez. Wood, notary public, the notice of non-payment, and the notice of presentment, which said notice was served upon the said defendant by the said Hez. Wood, notary public, according to law.

"D. P. HOLLAND, Plaintiff's Attorney."

The bill of exceptions shows that upon calling the cause for trial, the parties announced themselves ready; whereupon, and *before the jury were sworn*, the plaintiff, by his attorney, moved for judgment, upon the ground that the defendant had not produced the papers called for in the notice. The court refused to give judgment, holding that the defendant was not bound to respond to the notice until after the jury should have been empanelled and sworn, to which ruling the plaintiff excepted.

The bill of exceptions further shows that after the jury had been empanelled and sworn the defendant made the following answer to the notice, viz: "The defendant objects to the notice within, as calling upon him to prove a negative. Subject to this objection, he answers: First, that he has not in his possession, and never had, any of the papers

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and writings named and called for in within notice, and generally answering, he denies the right in law of the plaintiff to demand them.

JOHN D. GRAY,

“By T. J. EPPES, Attorney.

Upon the exhibition of this answer, the attorney for plaintiff again moved for judgment, upon the ground that the answer was insufficient and uncertain. The court refused to grant the motion, which was excepted to, and this, together with the former ruling, constitutes the first error assigned in his Court.

In order to understand the question involved in this assignment of error, we will set out the section of the statute under which the judgment was claimed by the plaintiff. It is in the following words, viz:

“The Courts of this State shall have power, on the trial of causes cognizable before them respectively, if it shall be satisfactorily proved that ten days’ notice was previously given to the opposite party, or to his, her or their attorney, to require the party notified as aforesaid to produce books and other writings in his, her or their possession, power or custody, which shall contain evidence pertinent to the issue; and if either party shall fail to comply with such order, or to satisfy the court why the same is not complied with, it shall be lawful for the court, if the party so refusing be plaintiff, to give judgment for the defendant, as in case of non-suit; and if defendant, to give judgment against him or her by default; *Provided*, that the party requiring the production of the books or papers as aforesaid shall in all cases satisfy the Court of their materiality in the causes therein depending.” Thomp. Dig., 343, sec. 7, § 1.

The statutory provision seems to have been designed only to aid the practice as it stood at common law. Under that practice, where the books or papers were alleged to be in the custody or control of the opposite party, and were shown to be material and admissible as evidence in the cause, it was

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permitted to a party, upon giving reasonable notice to his adversary, to require the production of such books or papers, to be used as evidence on the trial. But if the requisition thus made were disregarded by the party so notified, then the party making the requisition was permitted to resort to *secondary* evidence, such as copies of the original, or proof of their contents. This was the only advantage gained by the giving of the notice. Our statute goes further, and affixes a positive *penalty* on the party who refuses or neglects to respond satisfactorily to the requisition. If the recusant party be plaintiff, the penalty which he incurs is judgment of *non suit*, and if defendant, a judgment by *default* is entered against him. This is the only particular in which the practice is altered by this section of the statute. In every other particular the practice in reference to the production of books and papers stands as it did at common law.

The common law practice is thus stated by Mr. Greenleaf, in his Treatise on Evidence: "When the instrument or writing is in the hands or power of the adverse party, there are in general, except in the cases above mentioned, no means at law of compelling him to produce it; but the practice in such cases is to give him or his attorney a regular notice to produce the original, not that on proof of such notice he is compelled to give evidence against himself, but to lay a foundation for the introduction of secondary evidence of the contents of the document or writing, by showing that the party has done all in his power to produce the original." Greenleaf on Evidence, 710, § 560.

It is also laid down as a rule at common law, that before a party will be permitted to go into secondary evidence of the contents of the paper called for, he must prove the existence of the original, and upon the most obvious principles of propriety and sound reason he will be required to show the *materiality* of the evidence sought to be used. This showing is expressly required to be made by the statute re-

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lied upon by the counsel for the plaintiff. In the proviso to the section, it is provided that “the party requiring the production of the books or papers, as aforesaid, shall in all cases satisfy the court *of their materiality*,” &c.

In view of this essential pre-requisite, a rule has been adopted at common law with reference to the particular point of time in the progress of the cause at which the response to the notice to produce may be demanded. It is laid down that “*the regular time for calling for the production of papers* is not until the party who requires them has entered upon his case, until which time the other party may refuse to produce them, and no cross-examination as to their contents is usually permitted.”—1 Green. on Ev., 712, § 563.

If such be the rule at common law, “when the only benefit to the party giving the notice is the privilege of going into secondary evidence,” we can perceive no good reason why the same rule should not prevail in the practice under the statute, especially when it is brought to mind that the *penalty* visited upon the adverse party is the infliction of a judgment against him for his recusancy. We think, then, that the Judge below very properly refused the motion which required the defendant to respond to the notice before the jury had been called or the plaintiff had entered upon his case.

This disposes of the first exception embraced in the first error assigned, and we are now brought to the consideration of the second exception embraced in the same assignment, viz: the refusal of the Judge to give a judgment against the defendant *after* the jury had been *empanelled* and *sworn*. At this stage of the trial, it appears by the bill of exceptions, that the defendant responded to the notice by the answer set forth in the statement of the case.

This brings us to the consideration of the *materiality* of the paper demanded by the notice. It must be recollected

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that the plaintiff, as endorsee of an inland bill of exchange, was suing the maker, and that the paper demanded to be produced was the notice of protest which was alleged to be in the possession of the defendant. Now, it is very obvious that before this paper could become *material* to the support of the right of the plaintiff to recover upon the bill, it was necessary that he should have established his legal right to property in the bill. This he had not done at the time when his demand for judgment was made, nor, indeed, did he do so at any time afterwards. Of what avail would it have been to *him*, even if the defendant had voluntarily acknowledged due and legal notice of the protest? Before he could avail himself of this acknowledgment as matter of evidence to support his right to a recovery upon the bill, he must have shown his legal right to the same by proper proof of the several endorsements intervening between the payee and himself. This he had not done, nor indeed did he make any effort so to do at any time during the progress of the trial. Without feeling ourselves called on to pronounce upon the *sufficiency* or *insufficiency* of the defendant's response to the notice, we are very confident that at the stage of the trial at which the judgment was demanded by the plaintiff, he had not laid such a foundation as to make the paper demanded *material* to the issue before the jury. For these reasons, we think the Judge below was correct in refusing the judgment asked for, and we therefore overrule the second exception contained in the bill of exceptions; and this disposes of the first error embraced in the assignment.

The third and fourth exception relate to attempts to prove *indirectly* the presentation of the bill to the drawee and a protest for non-payment, but as the conclusions which we have arrived at upon subsequent exceptions are decisive of the cause, it is unnecessary to examine these further than to remark, that of all subjects of evidence there is none to

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which greater strictness is applied than to the proof of notice of protest.

The next error assigned is as to the refusal of the court to give to the jury certain instructions which were asked by the plaintiff's counsel. These instructions are as follows, viz:

"1st. That it was not necessary for him (plaintiff) to prove the assignment of the draft by Gray to Black, or of Black to Hawkins, or of Hawkins to plaintiff, in order to entitle him to recover in this suit upon the draft.

"2d. That inasmuch as there were no pleas to the money counts in the declaration, the plaintiff was entitled to recover.

"3d. That the draft sued on was evidence under the count in the declaration describing it as a promissory note."

In support of the first instruction asked for, the counsel for the appellant relies upon the statute in relation to suits brought upon "writings whereby money is promised or secured to be paid," and the effect of endorsing or assigning such writings. The statute reads as follows, viz:

"It shall not be necessary for any person who sues upon any bond, note, covenant, deed, bill of exchange, or other writing, whereby money is promised or secured to be paid, to prove the execution of such bond, note, covenant deed, bill of exchange or other writing, unless the same shall be denied by the defendant under oath.

"2d. The assignment or endorsement of any of the forementioned instruments of writing shall vest the assignee or endorsee thereof with the same rights, powers and capacities as might have been possessed by the assignor or endorser, and the assignee or endorsee may bring suit in his own name, nor shall it be necessary for the assignee or endorsee of any instrument assignable by law to set forth in the declaration the consideration upon which such assignment or endorsement was made, nor to prove such consideration, unless

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the same shall be impeached by the defendant under oath.”
Thomp. Dig., 348.

Under the operation of these provisions of the statute it is insisted by the counsel for the plaintiff, that, being invested “with the same *rights, powers* and capacities as might have been possessed by the assignor or endorser,” he was not bound to prove the fact of endorsement, inasmuch as the plea denying the endorsement had not been verified by the oath of the defendant. The idea seems to be that the provision of the statute which dispenses with proof of the *execution* of the instrument sued on unless denied under oath, is also applicable to proof of the *endorsement* or *assignment* of the same. But, for very obvious reasons, we think that such ought not to be the construction given to this statute. It may be of vital interest to the maker that the holder or assignee should establish, by competent proof, his *legal title* to the instrument, in order that he may be protected from making payment to a wrong party. Besides, this statute is in derogation of the common law, and is therefore not entitled to as liberal a construction as such an application of its provisions would call for. And we the more readily incline to this interpretation of the statute from the seeming limitation which occurs in the last clause of the second paragraph, when, after providing that the assignee or endorsee may bring suit in his own name, it goes on to say, “nor shall it be necessary for the assignee or endorsee of any instrument assignable by law to set forth in the declaration the consideration upon which such assignment or endorsement was made, *nor to prove such consideration*, unless the same shall be impeached by the defendant under oath.” In this clause there is nothing said about proving the fact of *endorsement* or *assignment*; it refers exclusively to proving the *consideration* upon which the assignment may have been made. And without intending to decide the extent of the “rights, powers and capacities” spoken of in the

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first clause of the paragraph, it may not be out of place to remark that the view here intimated seems to be strongly fortified by the opinion of Justice Nelson, when this statute was under review in the Supreme Court of the United States in the case of Bradford et al. vs. Williams.

In delivering the opinion in that case, Justice Nelson says: "The act just recited provides that the assignee shall be vested with the same rights, powers and capacities as might have been possessed by the obligees, and inasmuch as the bonds were uncollectable at law, in the hands of the obligees, it has been argued that, upon the words of the statute providing for the assignment and suit in the name of the assignee, they must be equally invalid and inoperative after assignment, in his hands."

"This argument doubtless would be well founded and conclusive against the plaintiff, if the objection to the bonds was such as went to vitiate and destroy the legal force and effect of their obligation, such as usury, illegality, or the like which would constitute a valid defense to a suit in any form in which it might be brought. So in respect to any other defense in discharge of the obligation, such as payment, release and the like; for the assignee takes the bonds subject to every defense of the description mentioned, and can acquire no greater rights by virtue thereof than what belonged at the time to the obligees. *This, we think, is what the statute intended, and is all its language fairly imports,*" &c., 4 How. S. C. Repts., 587.

The second instruction prayed for cannot be sustained upon any principle known to the practice of the common law courts. The instruction asked for and refused was, "That inasmuch as there were no pleas to the money counts in the declaration, the plaintiff was entitled to recover."

It is undoubtedly true, that where the defendant fails to tender a defence to any particular count of the declaration, in such case the plaintiff is entitled to a judgment upon that

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particular count as for a default; but such judgment must be given by the court, and it is not the subject of instruction to the jury. The jury have no right to pass upon the pleadings. That is the exclusive province of the court. If the plaintiff desired to avail himself of any benefit growing out of the failure of the defendant to plead to the common counts, he should, prior to submitting his case to the jury, have asked for his judgment for want of plea, and for the award of a *writ of enquiry*, inasmuch as the common counts always proceeds for an unliquidated amount. This is the well established practice of the courts, and we think that the Judge below very properly refused to give the instruction.

The third instruction asked, and refused, was, "That the draft sued on was evidence under the count in the declaration describing it as a promissory note." Without feeling ourselves called upon to determine whether the instrument sued on was in legal contemplation a bill of exchange or a promissory note, we are perfectly satisfied that, under the evidence adduced at the trial, the court acted correctly in refusing the instruction. It is a settled principle, that none but a party holding *the legal title* to an instrument can maintain an action upon it in the common law courts, and that, to obtain a recovery upon the same, he must establish that title on the trial by competent evidence. This elementary principle, it is thought by the counsel for the appellant, has been totally abrogated, or, at least, so far modified by the statute as to dispense with the proof of the fact of assignment; but, as before stated, such is not the opinion of this court. Now, to determine the propriety of the instruction prayed for, it is only necessary to advert to the position of the case at the time that the instruction was asked. The action was brought upon an order drawn by the defendant John D. Gray on the L. W. & St. Joseph R. R. Co., and payable to James Black or order. The paper purports to have been endorsed by Black, the payee, to William Hawkins, and by

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him to Sinclair, the plaintiff, who instituted his suit as endorsee thereof. At the trial, there was not even an attempt made to prove these several endorsements, the proof of which fact was essential to establish the legal title of the plaintiff to the instrument. Under these circumstances, it would have been a great error in the Judge below even to have permitted the instrument to be exhibited to the jury as evidence in the case, and much graver would have been the error had he given the instruction asked.

It may not be improper, in this connection, to remark, that until the recent rules adopted by the English Courts, (and which have been closely followed for the regulation of the practice in our common law Courts,) the plea of *non-assumpsit* put in issue the endorsement as well as the making of the instrument sued on. But, under the operation of these rules, that plea is inadmissible in actions upon bills of exchange and promissory notes, and the defendant must now resort to a special plea in denial, if he wishes to put the plaintiff to the proof of the particular fact.

The points presented in this case being matters which frequently occur in practice, we have been induced to go more fully into the discussion than the amount in controversy might seem to warrant or justify.

It is ordered that the Judgment of the Circuit Court be affirmed with costs.

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WALTES & WALKER, FOR USE OF WILLIAM C. GATEWOOD,
APPELLANTS, VS. THOMAS L. WHITLOCK, APPELLEE.

1. A transfer of personal property, including choses in action, rights and credits, valid were made, will be recognized by our courts, provided it be not contrary to good morals nor repugnant to the policy and positive institutions of the State.
2. There are no laws in Florida prohibiting a citizen of another State from a free disposal of his personal property, situated here, for honest purposes and without fraud.
3. A *revolutionary* assignment by the owner to an assignee in trust for the benefit of creditors, made in the State of South Carolina and valid by the law of that State, and which, if made in Florida with the intention of being used here would have been considered valid in this State, will operate upon property situate in this State.
4. In such assignments, the rule of transfer is the same in all choses in action, whether the same be an *open account* or promissory note.
5. Notice to the debtor is not necessary to a delivery and transfer of an open account thus assigned.
6. Fraud for want of delivery of possession of choses in action by the assignor to the assignee under such assignments is a question of fact to be determined by a jury in a cause instituted in common law courts.
7. An assignment for the benefit of creditors, executed in another State, valid by the laws of that State and valid by the laws here, will be enforced by the courts of this State against a subsequent attachment, although said attachment may be issued by one of our own citizens, and an open account due from a debtor to the assignor attached, and garnishee process issued previous to notice of said assignment to said debtor, *unless notice is required to be given by the terms or necessary effect of the assignment itself.*
8. Notice to the *debtor* of the assignor in such case (unless required to be given as aforesaid) is only necessary to prevent the debtor from dealing with the assignor so as to affect the rights of the assignee.
9. Where debtor of an assignor is garnisheed by virtue of an attachment issued subsequent to the assignment, and receives notice of the assignment, *pendente lite*, he should avail himself of the assignment in discharge by answer to the garnishee.

This case was decided at Tallahassee.

Appeal from Madison Circuit Court.

FORWARD, J., who delivered the opinion of the court, read

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the following statement of the facts of the case prepared by himself:

The facts of this case, as appears by the record, as thus:

On the 7th day of April, A. D. 1854, the said Walters & Walker made and executed a *voluntary* deed of assignment in the city of Charleston, in the State of South Carolina, of certain property, real and personal, book accounts, notes, bills, choses in action of them, the said Walters & Walker, whether the same were then due and owing by persons in South Carolina, Georgia, Florida, Alabama or elsewhere, and *all their right, title, interest, estate and property therein*, to the said William C. Gatewood, to have and to hold the same in trust for the creditors of said Walters & Walker, as therein specified. That said deed of assignment may be seen, it is set forth at full length:

“Know all men by these presents, that we, E. Wilmot Walker, George H. Walker and Richard Walker, in consideration of the sum of five dollars, to us paid by William C. Gatewood, the receipt whereof is hereby acknowledged, have and each of us hath. and do and each of us doth, by these presents, assign, transfer, grant, release and set over unto the said William C. Gatewood all and singular one-eighth interest or share in all that wharf property known as Boyce & Company’s wharf, subject to a mortgage from George H. Walker and R. T. Walker to the Master in Equity, James Tupper, Esq., for part of purchase money; also two hundred shares in the Fireman’s Insurance Company, of Charleston, standing in the name of E. Wilmot Walter in trust for Walters & Walker; also fifty shares in the Planters Bank of Fairfield, standing in the name of Walters & Walker; also three-eighths interest or share in the brig Mary Ann, of Charleston; also house and lot in the town of Rome and State of Georgia, purchased by Walters & Walker from L. A. Allen; also one negro man slave named Prior, now in the State of Georgia; also two farm

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lots and buildings near the town of Rome, in the State of Georgia, purchased from Joel Marable; also all bales, bags and lots of cotton upon which advances have been made by us, whether the same are now in our possession or are under consignment to us; also all and singular the debts, balances, notes, bills, bonds, mortgages, books of account and choses in action of all and every kind whatsoever to us belonging, whether the same be due and owing by persons in South Carolina, Georgia, Florida, Alabama or elsewhere, and all our right, title, interest, estate and property therein: To have and to hold, take and receive the same unto the said William C. Gatewood, his heirs, executors, administrators and assigns, upon and for the trust, interests and purposes hereinafter declared, to-wit: upon trust that he shall and do, with all convenient speed and in the most advantageous manner, make sale, dispose of and convert all and singular the said estate and effects, real and personal, into money. and stand possessed of the same upon trust, in the first place. to pay and discharge all costs and charges attending the preparing and recording of these presents and of a certain deed or release hereinafter mentioned, and also the charges and expenses to be incurred in the execution of the trust herein created; and upon trust, in the next place, to pay and discharge all notes, bills or other liabilities of the said William C. Gatewood and Dr. Eli Geddings upon our account, and to indemnify and save harmless the said William C. Gatewood and Dr. Eli Geddings from and against all endorsements or liabilities for and on account of us or any of us, the said moneys to be applied rateably and proportionately, and without priority or preference, between them; and upon trust, in the next place, to pay James S. Gibson the sum and sums of money loaned by him to the said Walters & Walker, amounting to about nine thousand dollars, with the interest due thereon; and upon trust, in the next place, to pay E. W. Charles, of Darlington, the sum and sums of

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money due him by us, amounting to about fifteen hundred dollars; and upon trust, in the next place, to pay Abram Van Buren, of Richland District, the balance of account due him by us, amounting to about seven thousand dollars; and upon trust, in the next place, to pay William R. Ryan the amount due him by us, for money loaned, amounting to about one thousand dollars; and upon trust, in the next place, to pay Marcus Reynolds, of Statesburg, the balance of account due him by us, amounting to about two thousand dollars; and upon trust, in the next place, to pay William Aiken, of Charleston, the balance due him of about twenty-two hundred dollars; and upon trust, in the next place, to indemnify and save harmless J. L. Thompson, of New York, from all liabilities and damages on account of his acceptance of our drafts, amounting in the whole to about seventeen thousand dollars; and upon trust, in the next place, to pay Payne and Bickley a balance due them upon open account, and note, amounting to about eleven hundred dollars; and upon trust, in the next place, to pay Hayne and Yates a balance of account due them of about three hundred dollars; and upon trust, in the next place, to pay M. R. Singleton whatever balance may be found due to him upon a settlement of account and liabilities between him and us; and upon trust, in the next place, to pay, or cause to be paid, rateably and proportionately and without any priority or preference, the claim and demand of the several persons, creditors of the said Walters & Walker, and of any or either of us, who shall on or before the first day of June next ensuing, and by noon of that day, sign, seal and deliver to the said Walters and Walker, and each and every of us, a full and clear acquittance and discharge of and from their respective claims and demands, so that we and each of us, the said Walters & Walker, shall thenceforth be from them forever discharged and released; and, lastly, in trust to pay or cause to be paid the residue of said

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money which shall remain after payment and satisfaction of the last mentioned debts into and among, rateably and proportionably and without priority of preference, *all others* the creditors of the said Walters & Walker; and we, the said Walters & Walker do hereby appoint the said William C. Gatewood our lawful attorney irrevocably, in our name or otherwise and upon and for the trust aforesaid, to demand, sue for, recover and receive all and singular the premises assigned and released in trust, and upon the receipt of the same to give the necessary acquittance, to compound for the same, or any part thereof, or settle the same by arbitration, and generally to do and execute all things necessary or proper to effect the interest of these premises or presents; and the said William C. Gatewood is hereby fully authorized by and with the consent of a majority in interest of the creditors of the said Walters & Walker, or of the agent of said creditors, should one be duly appointed, to make partition and division of all the real estate herein assigned with the other part owners thereof respectively; and the said William C. Gatewood, for himself, his heirs, executors, administrators and assigns, doth hereby covenant and agree to and with the said Walters & Walker that he, the said William C. Gatewood, shall and will from time to time and as often as any monies shall by reason of these presents come to his hands, hold and apply the same upon the trust and in the manner hereinbefore expressed and declared concerning the same.

“In witness whereof, the parties to these presents have hereunto set their hands and seals, this seventh day of April, in the year one thousand eight hundred and fifty-four, and in the seventy-eight year of Independence.

E. WILMOT WALTER, [SEAL.]

GEO. H. WALTER, [SEAL.]

R. T. WALKER, [SEAL.]

WM. C. GATEWOOD, [SEAL.]

“Sealed and delivered in presence of STEPHEN E. PELOT,
GEORGE REID.”

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Which said instrument was recorded in Charleston on the 8th day of April, A. D. 1854; that said William C. Gatewood, as such assignee, on the 2d day of April, A. D. 1855, instituted a suit in the Circuit Court of Madison county in the name of said Walters & Walker, for the use of said assignee against the said Thomas L. Whitlock, a resident of said county, to recover a book account of said Walters & Walker thus assigned. The declaration contains the common counts in assumpsit. The evidences of the indebtedness are as follows:

“506.00.

BANK OF SOUTH CAROLINA,

Agency at Greenwood, Oct. 8, 1853.

“Sixty days after date, pay to the order of J. Bailey, Agent, Five Hundred and Six Dollars, value received, and charge the same to account of

THOMAS L. WHITLOCK.

To Messrs. WALTERS & WALKER, Charleston, S. C.”

Mr. T. L. WHITLOCK to WALTERS & WALKER, Dr.

Oct. 8, 1853—For draft in favor of J. Bailey Agt.,

60 days, \$506 00

To int. from 10th Dec., 1853, to 25th

May, '54, 166 d., 16 10

2½ coms. on \$506, 12 65

\$536 75

The defendant filed the general issue and the following plea:

“The defendant Whitlock, for plea saith, that *before* the institution of this suit, William McNaught and James Ormond, partners trading as McNaught & Ormond, instituted an action of assumpsit in Madison Circuit Court against the said Walters & Walker, plaintiffs, and sued out a writ of attachment and writ of garnishment to this defendant, and that said writ of garnishment was duly served upon this de-

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fendant on the day of , A. D. 1854, and *before* any notice to this defendant of the assignment by said Walters & Walker to said Wm. C. Gatewood, for whose use this suit is instituted.

“And the said defendant further saith, that since the institution of said suit, to wit: on the day of , A. D. , the said McNaught & Ormond, by the judgment of the Circuit Court aforesaid in and for said county aforesaid, recovered in their suit aforesaid against Walters & Walker the sum of dollars, as appears of record in said court, page , liber , of the minutes of said court, and which said judgment remains in full force and unpaid and exceeds the sum claimed by the plaintiff in this suit; and this the defendant is ready to verify,” &c.

To which the plaintiffs replied in substance: “That said Walters & Walker were citizens, merchants and partners, trading in South Carolina and in Florida; that on the 7th day of April, 1854, in Charleston, South Carolina, the said Walters & Walker made and delivered to Wm. C. Gatewood an assignment of *all their* property, real and personal, choses in action, bills, bonds and notes, and all their assets, to said Gatewood, for *the payment of creditors*, which said assignment was valid by the laws of South Carolina, and which said assignment included the debt due from defendant to Walters & Walker.”

The rejoinder was the general similiter.

These being the pleadings, the counsel filed an agreement, which reads thus:

“It is agreed between the counsel of plaintiffs and defendant in this case that all matters of evidence shall be put in under the above pleas, and exceptions shall be taken by the counsel as they desire to the rulings of the court, without reference to the nature of the pleadings, so as to bring before the court all the points of difference between the counsel on each side and the court.”

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The plaintiff read in evidence the above draft and account, which were admitted by defendant's attorney to be valid demands to the amount of the above stated account (\$536.75.) The plaintiffs also read in evidence the above deed of assignment, and here rested.

The defendant then offered Thomas L. Whitlock in evidence, who, being duly sworn, testified that the garnishment and attachment process in the suit of McNaught & Ormond was served on him *before he had notice* of the assignment of Messrs. Walters & Walker to Wm. C. Gatewood, which was admitted, though the papers could not be found, but that he received notice of said assignment a month or two after the service of said writ of garnishment.

It was admitted that McNaught & Ormond had recovered judgment in their said attachment suit.

This being all the testimony, the plaintiffs' counsel moved the Court to instruct the jury "that the assignment of Messrs. Walters & Walker, offered in evidence in this case, is and was operative and valid to pass the debt of defendant to the assignee, William C. Gatewood, from the date of its delivery, and that the title of the assignee was paramount to the lien of the garnishment," which instruction the Court refused, and to this refusal plaintiffs' counsel excepted, whereupon the Court instructed the jury "that the assignment was not valid to pass to the assignee any chose in action which did not pass a title to the holder by delivery, and that no debt or demand resting in open account passed to the assignee under the assignment *until notice was served on the debtor* by the assignee, and that drafts drawn by a debtor on his factor or commission merchant, and notes of such debtor paid by the factor or commission merchant and entered in a book account, were matters resting in open account, and did not pass to the assignee under the said assignment as against the attaching creditor."

The Court further ruled "*that the debt of defendant,*

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Thomas L. Whitlock, was subject to be recovered by the said McNaught & Ormond in the suit against said Walters & Walker and the garnishment issued thereon, and instructed the jury that the defendant was not liable to plaintiff under the rulings of the court."

The jury found a verdict for defendant, upon which judgment was entered, and from said judgment appeal is taken to this court.

The errors assigned are—

1st. The Judge erred in refusing to give the instruction asked by plaintiffs' counsel.

2d. The Judge erred in ruling that notice to the debtor was necessary to pass the title of an open account or other chose in action, which did not pass by delivery as against an attaching creditor.

3d. The Judge erred in ruling that the garnishment under attachment process of McNaught & Ormond created a lien paramount to that of the assignment.

4th. The Judge erred in ruling that an attachment intervening the execution and delivery of an assignment valid by the laws of the State where made and notice to the debtor in the case of an open account, has priority over the assignment.

5th. The Judge erred in instructing the jury that drafts drawn on a factor and notes of a debtor paid by such factor and interest on a book account, were an open account, and that the cause of action in this suit was an open account, and did not pass to the assignee under the assignment, and was subject to be recovered by the said McNaught & Ormond on the garnishment against defendant.

6th. The court erred in instructing the jury that defendant was not liable to plaintiff.

W. Call for appellants.

M. D. Papy for appellee.

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FORWARD, J., after reading the statement prepared by himself, proceeded to deliver the opinion of the court.

The refusal of the Judge in the court below to give the instructions asked for by plaintiff's counsel brings us to consider whether the court erred in so doing, and whether the charge of the court under the evidence in the case was correct and proper.

As this assignment was executed in Charleston, in the State of South Carolina, it becomes us, *first*, to inquire what was its effect upon the assets of said Walters & Walker in this State, and what force our courts of law will give it, as regards citizens of our State.

Secondly. Whether such assignment transfers the interest of said Walters & Walker to said assignee, notwithstanding a subsequent garnishment, by a creditor of the assignee, and

Thirdly. Whether *notice* to the debtor, Whitlock, is necessary to a delivery and transfer of an open account thus assigned.

There is a clear and well defined distinction, supported by the weight of American authority, between *involuntary* transfers of property, such as work by operation of law under foreign bankrupt assignments and insolvent laws, and a *voluntary* conveyance. An assignment by law has no equal operation out of the State in which the act was passed, while a voluntary assignment, it being by the owner, is a personal right of the proprietor to dispose of his effects for honest purposes.

There is no better settled principle of law than that personal property is transferable according to the law of the owner's domicile.

Says Chancellor Kent, in his Commentaries: "The necessary intercourse of mankind requires that the acts of parties valid where made should be recognized in other countries, provided they be not contrary to good morals nor

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repugnant to the policy and positive institutions of the State.”
2 Kent's Com., 455.

Acting upon the great and social principle, the common law of England and America have settled that every contract, whether made between foreigners, or between foreigners and citizens, is deemed to be governed by the law of the place where it is made, and is to be executed. Story on Conflict of Laws, § 278.

It is by courtesy, comity or mutual convenience of nations, and a yielding to the demands of intercourse in commerce, that our courts sanction the admission and operation of foreign laws relative to contracts.

This comity, however, does not require our courts to enforce a contract according to the laws where it is made, if such enforcement would be in conflict with our laws, and being thus in conflict, the enforcement thereof would work against our own citizens, and give to the foreigner an advantage which the resident has not.

There is no doubt that each State has jurisdiction over all property within its limits—has a right by statute to authorize creditors to treat an assignment as a nullity, as also to pass laws subjecting the property of non-residents within its limits to the payment of debts, and to forbid that any creditor should be preferred, as also to prescribe the manner of conveyance thereof, and to declare what acts shall be deemed fraudulent, all of which together with the common law in force therein, should be considered by the court in ascertaining whether there is any conflict with our laws. Whether courts of justice, independently of positive legislation or local established regulations in regard to the transfer of personal property, can discriminate in favor of its own citizens, and maintain their consistency in holding that personal property has no locality, is quite a different question. Story on Conflict of Laws, § 390.

These being the well established general principles, it fol-

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lows that we are to inquire, *first*, whether this deed was valid instrument in the State where it was executed; *secondly*, whether it is such an assignment as would have been enforced in this State had it been executed here and intended to be used here; and, *thirdly*, whether it gives to foreign creditors an advantage over creditors, citizens of our own State?

It is a voluntary assignment made by a debtor residing South Carolina for the benefit of his creditors. Was it valid instrument in that State, and did it take effect immediately on its execution and delivery, and pass a legal estate to the trustee? In ascertaining this, the courts of the State must be presumed to be the best expositors of the own laws and of the terms of contracts made with reference to them.

Here we will remark that it has not been contended by the learned counsel for the appellee that the assignment was not a valid instrument in both Carolina and Florida, and that under it choses in action, such as notes and liquidated debts, vested in the assignee immediately on its execution; but he contends that title to an open account will not pass to the holder by delivery, and that *notice* to Whitlock (the debtor) was necessary to the perfect transfer of an open account, not only in Carolina but Florida, and so the court below charged the jury.

The cases of *Mitchell vs. Smith*, 3 Strobhart's Law Rep. page 244; *Dargan vs. Richardson*, Cheves' Reps., 197; *Tibbetts vs. Weaver*, 5 Strobhart's Law Rep., page 146, conclusively establish the validity of this assignment in the State where it was executed, and that it would be enforced in every particular there, even in a case like the one now under consideration.

Dargan vs. Richardson and *Mitchell vs. Smith* both decide, "That a letter transferring notes, though not re-

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will fix the rights of the assignee so as to take precedence to the lien of an attachment levied after the date of the letter of assignment, but *before* it was received and accepted by the assignee.”

In *Tibetts vs. Weaver*, the court say: “The principle upon which a court of law protects the assignee, when the suit is not in his own name, applies to ALL choses in action equally. The case of *Winch vs. Kelly*, where it was recognized, was *indebitatus assumpsit* for work and labor, &c. Our late case of *Mixon vs. Jones* was a demand for mill-right’s work, done under special contract.”

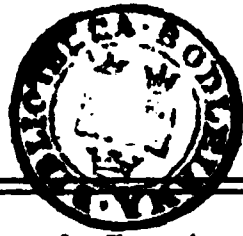
These cases establish beyond a question that in South Carolina the rule is the same in all choses in action, whether the same be an *open account* or promissory note. So the numerous cases cited by the counsel for appellant declare the rule to be in other States, and so held in the U. S. Circuit Court in *Dundas et al. vs. Bouler et al.*, 3 McLean’s Reports, 399.

It appearing clear that this assignment was good and valid in the State of South Carolina, and would be enforced there in all its provisions, we are next to enquire whether there is anything contained in it, or any of its provisions, repugnant to the laws of our State, such as would render it illegal were the deed of assignment executed, and the parties resident in Florida, and intended to be enforced here.

Our courts fully recognize the right of a debtor, in insolvent circumstances, to make an assignment of all his property, real and personal, including book accounts, choses in action and rights and credits, both at law and in equity, and the right of the assignee to bring suit in the name of the assignor for his use; and in the case of *Bellamy vs. Bellamy*, adm’r, 6 Florida, page 63, lay down the law to be that “a debtor, in insolvent circumstances, may, before lien attaches, lawfully prefer one creditor or set of creditors to another,” and that “a sale, assignment, or other conveyance, is not

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necessarily fraudulent because it operates to the prejudice of a particular creditor.” The only reservations by the institutions, policy and laws of our State, are to creditors in cases of fraud, where reservation for the use of the assignor is made, and where the same is made with a purpose or intent to hinder, delay or defraud them. It is true, our statute authorizes the issuing of attachment, but we cannot see how a general assignment can be considered a fraud upon the attachment laws or the garnishee process accompanying it. In *Halsey et al. vs. Whitney et al.*, Mason’s Reports, 210, Judge Story says: “As to the position that general assignments are a fraud on our attachment laws, for myself, I have never been able to understand precisely what is meant by this language,” &c. “Our attachment law is nothing more than a common process, by which any creditor may attach the property of his debtor at the institution of his suit, so as to secure a priority of right to take the same by a levy and satisfaction on the execution which may issue on the judgment in such suit for his own use.”—*Holmes vs. Remsen*, 20 S. R., 260. The assignment operates instantaneously to divest the interest of the assignor. If this be so, there is nothing left after the assignment is made for an attachment to reach. The beneficial interest, as in this case, is out of the assignor and vested in an assignee in trust. The beneficial interest being in a third person, (the assignee,) is not subject to execution or lien. Were this deed of assignment executed in this State, to be issued here, it seems clear it would be valid and our courts bound to enforce and protect the assignee, unless void wherein it attempts to transfer choses in action, or book account, or other personal property, in consequence of the assignors having retained possession, should this appear to be the fact. We are at a loss to understand how or by what means our court, in recognizing this assignment, would be enforcing acts of parties contrary to good morals or repugnant to the policy and positive institu-



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tions of the State, or, by enforcing the same, work against our own citizens by giving to the foreigner an advantage which the resident has not. Certainly Messrs. McNaught & Ormond, the attaching creditors, would have been in the same position they are now had the assignors been residents of Florida and executed the assignment here, to be used here.

The counsel for the appellee cites and relies mainly upon the following authorities, viz: Fox vs. Adams, 5 Maine Rep., 245; Ingraham vs. Geyer, 13 Mass. Rep., 146; Bryan vs. Brisbin, 26 Missouri Rep., 423.

The assignment in question, before the court in Missouri, was executed in Minnesota and gave a *preference* to creditors which was repugnant to the laws of Missouri, and the court very properly say: "Under such an assignment here, the title would pass, *but the provision for preference would be totally disregarded.*" This was the only point decided in that case, and, were there any provisions contained in the assignment we are now considering repugnant to the laws, policy and positive institutions of Florida, this court would decide in the same way.

So in the case of Ingraham vs. Geyer. The assignment was made in Philadelphia and was repugnant to the decisions of the courts of Massachusetts. Parker, C. Justice, in delivering the opinion of the court, commences by declaring: "*This assignment could not be supported, if made within this State by parties residing or living here, and with a view to be here executed.*"

The case of Fox vs. Adams et al. goes further, and the court in that case place their decision upon the ground that a general assignment made by an insolvent debtor in another jurisdiction shall not be permitted to *operate upon property in that State* so as to defeat the attachment of a creditor residing there. Whether there were any provisions in that assignment contrary to the laws of Massachusetts does not

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appear, but it would rather seem that, by operation of the instrument in Pennsylvania, where it was made, the creditor residing in Massachusetts would be deprived of all opportunity of participating with the creditors in the other State. Such being the effect, it is perfectly consistent with the principles required by the comity of nations. Without such an effect appearing, we must most respectfully differ from the rule of comity between States laid down by the Massachusetts court.

This assignment being a *voluntary* one, by deed, formal and irrevocable, containing no provisions repugnant to our own laws, nor to the policy and positive institutions of this State, and there being nothing to prohibit the assignors, who are citizens of another State, from a free disposal of their personal property situated here, we must, upon the principles of comity between sister States, hold the assignment valid here, and that it operated at its execution to vest the title in the assignee and divested all the interest of the assignors, unless void for want of delivery of the choses in action assigned to the assignee.

This brings us now to consider whether an open account, thus assigned, will pass to the assignee a title by delivery, and whether a delivery of the chose in action or "open account" to the assignee by the assignors was necessary to the protection of the assignee against this attachment, and, if so, whether delivery was made according to law; and, if not, whether the question of delivery or non-delivery was not a question of fact to be determined by the jury, and whether notice to the creditor was essential to the protection of this account from attachment.

We have hereinabove decided, that under voluntary assignments for the benefit of creditors, the rule as to transfer of choses in action is the same in South Carolina and Florida, and the same, whether it be an open account or promissory note, payable to the assignor. It follows, then, that an open

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account may be transferred by delivery of possession in cases of clear and manifest assignment.

Courts of common law protect the assignment of choses in action.—Welch vs. Mandeville, 1 Wheaton, 233.

At common law, a bargain and sale of personal property without delivery transfers the legal property in goods, but where the possession remains in the vendor unexplained, it is fraudulent as to creditors.

It may be questionable how far, in the case of an assignment for the benefit of creditors, want of delivery of possession would make it fraudulent.—Mitchell vs. Willock, 2 Watts & Serg., 253; Filter vs. Maitland, 5 Watts & Serg., 307; U. States vs. Hooe, 3 Cranch, 73.

But, assuming that the want of delivery of the chose in action would make the transfer fraudulent, was not this delivery of possession a question of fact under the evidence to be submitted to the jury?

What possession of the assignor, under a deed of assignment for the benefit of creditors, will be consistent with the transfer will depend upon the terms of the instrument and the situation of the property.—Story, Justice, in Meeker vs. Wilson, 1 Gallison, 419.

But, assuming delivery of the “open account” declared on in the case by the assignors to the assignee was necessary to the perfect vesting of title of the same in the assignee, what kind of delivery would he make?—and what would be required of him? It would seem to us, that, in ordinary cases, delivering the evidence of indebtedness would be the most conclusive mode of giving possession. This was so held in the case of the United States vs. The Bank of the United States, Robinson’s Reports, page 413. In that case, the Supreme Court of Louisiana say: “*We do not know of a more conclusive mode of giving possession of a debt than by delivering the evidence of it.* In some cases, notice to the debtor is required to be given, but *not always.*”

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In case of transfer of bills of exchange and notes payable to order, no notice is necessary previous to maturity; nor is it afterwards, except for the purpose of preventing the parties bound from acquiring equities against the holder to which they might be entitled if not notified." Burrill on Assignments, 323.

This we deem the most conclusive mode, but whether possession is given or not is a question of fact, to be determined by the jury. Whether its retention by the assignee is consistent with the deed is for the court to construe, and whether such delivery be possible under the facts and circumstances of the property may also be a question.

Whether the evidences of the indebtedness of Whitlock to Walters & Walker were or were not in the possession of the assignee at the time Messrs. McNaught & Ormond served their attachment does not appear in the record, nor does it appear that this was a subject of enquiry on the trial.

The court charged the jury, "*That no debt or demand resting in open account passed to the assignee under the assignment, as against the attaching creditor, until notice was served on the debtor by the assignee.*" And the counsel for the appellee relied on the authorities cited by him to sustain the necessity of notice.

We have searched in vain for any such law in force in this State. It is true the syllabus to the case in Missouri Reports would seem to intimate that *notice* of an assignment to a debtor would prevent attachment, but no such question arose in that case, nor was it so decided. None of the South Carolina cases cited hold that notice for this purpose is necessary.

The case of Beckwith vs. The Union Bank of New York, 5 Seldon, 211, was an assignment of money on deposit in Bank, which must be considered in the nature of an open assignee's account. The court in that case held that the assignee's right to the money was complete, without giving notice of

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the assignment to the Bank, and that “*no notice was necessary to perfect that right in the assignee, except only that in default of notice, the Bank might have so dealt as by its subsequent acts to have affected his rights.*”

It is stated that *notice* is necessary in “*some cases.*” This we apprehend is where it is required to be given by the terms or necessary effect of the assignment itself.

Burrill, in his valuable Treatise on Assignments, page 466, says: “The object of giving notice of the assignment is to give publicity to the transaction, for a two-fold purpose—to apprise the creditors of the transfer and to instruct them as to their proceedings to obtain its benefit, and to *inform* the DEBTORS of the assignor and persons having moneys or property belonging to him in their hands, to whom they are to account and to pay and deliver the same;” and this was what was held in the case of Tibbets vs. Weaver, 5 Strobhart, 144.

“By the law of some countries,” says Story’s Conflict of Law, §395, “an assignment of a debt is good without any notice to the debtor, and takes effect *instantly*,” and in §396, that commentator says: “According to our law, an assignment operates *per se* as an equitable transfer of the debt.” Again, in §398, in speaking of the decisions of Lord Kenyon, Lord Hardwicke and Lord Loughborough, he says: “*The question of prior notice or intimation does not seem to have been thought by them material, for they treat the transfer as complete from the time of the assignment.*”

This assignment was a trust created for the benefit of creditors, among whom are Messrs. McNaught & Ormond, and a legal estate passed on the execution thereof to the trustee. By its execution the assignors agree that this debt of Whitlock shall be thus applied, and for that purpose transfer all their right and interest. They, the assignors, lost all power over it, and could make no other disposition of it. Why then is a notice to Whitlock necessary for the

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passing title in this account? It could not vary it in any way, and only be serviceable for the purposes above mentioned.

Whitlock admits he had notice of the assignment *lis pendens*, the garnishment. Had he desired to protect himself, it was his duty to set up the assignment in answer to the garnishee process. Story on Conflict of Laws, § 396.

The pleadings in this case and the stipulation of the parties necessarily interplead Messrs. McNaught & Ormond, and we have been in consequence thereof compelled to consider this cause as though McNaught & Ormond were parties, and it was a suit between them and the assignee.

We are of the opinion the Court below erred in the instructions given to the jury, therefore the judgment of the Circuit court must be reversed and set aside, and the cause remanded for a new trial. Let judgment be entered accordingly, with costs.

JOSEPH W. RUSS, ADM'R OF THE ESTATE OF MARGARET B. RUSS AND OTHERS, APPELLANTS, VS. MARTHA J. RUSS, A MINOR, BY HER NEXT FRIEND, B. F. PARKER, APPELLEE.

1. J. R. devised to his wife, during her natural life, certain real and personal estate, remainder over to his children, J. W. R., M. E. and M. B.; also to his three children, J. W. R., M. E. and M. B., *and the heirs of their body* separate legacies of personal property; also to his grand-daughter M. J., who is a daughter of a *deceased son*, certain personal property, to be held in trust for her, but if she should die without any child or children living at the time of her death, then to belong to his *three* children, J. W. R. M. E. and M. B., share and share alike; also to his stepson, E. L. M. A., he gives certain personal property, after the death of his widow, and if the said step-son should die *without heirs of the body*, to the said M. E. and M. B., and

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by a subsequent item of the will declares : *"It is my will, that in the event of the death of J.W.R., M. E. or M. B., without heirs of their body of the ONE so dying, that his or her property be equally DIVIDED between the SURVIVORS,"* M. B. died unmarried and without children : *Held* that from the superadded words and expressions and circumstances contained in the context of the will, it was the *intention* of testator to fix the period of failure of issue of said M.B. *at the time of her death* without child or children living ; that the words "heirs of the body" and "without heirs of the body" are to be construed *children*, to carry out the intent of the testator, and that the limitation over to J. W. R., M. E. and M. B. was good by way of executory devise.

2. The intention of the testator is the polar star to guide in the construction of a will, which intention does not depend on any particular clause standing by itself, but is to be gathered from the whole will, taken together ; and where the testator's intention is manifest, it must prevail if it is not contrary to some positive or settled rule of law.
3. General words in one part of the will may be restrained in cases where it can be collected from any other part of the will that testator did not mean to use them in their general sense.
4. The rule in "Shelley's case" and the rule in executory devise, given, as defined.

This case was decided at Marianna.

Appeal from Jackson Circuit Court.

The following statement of the facts of the case was prepared by Mr. Justice FORWARD :

The bill of complaint in this cause is filed by Martha J. Russ, called in the will, hereinafter inserted, Mary Jane Russ, a minor, by her next friend, against Joseph W. Russ, as administrator of the goods and chattels, lands and tenements, rights and credits of Margaret Belle Russ, deceased, and Henry Humphreys and his wife Mary E. Humphreys.

The bill sets forth that Joseph Russ, the grandfather of Oratrix, departed this life in Jackson county, Florida, in the spring of 1849, having first made and executed a last will and testament, which is herein inserted at full length, and is in the following words, viz :

"I, Joseph Russ, being of sound and disposing mind and memory, do make, publish and declare this as my last will and testament, hereby revoking and declaring null and void any and all wills by me at any time heretofore made.

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Item 1st. It is my will that all my just debts be paid as soon as my executors may be able to do so, and to enable them to do so more effectually and speedily, I hereby authorise them to sell such portion of my real estate and my negro property as may be necessary for that purpose, at private or public sale.

Item 2d. I give and bequeath to my wife, Elizabeth Russ, the following slaves: Fuller, Sophia, Susannah, Sue, Abraham, Adam, Calvin, Michael, Jackson and Smart, for and during her natural life, and at her death to be equally divided between my children, Mary E. Russ and Margaret B. Russ. I also give unto my said wife the following slaves Martha, Mansfield and Mary, for and during her natural life, and at her death it is my will that Martha belong to Joseph W. Russ, Mansfield to Mary E. Russ, and Mary to Margaret B. Russ.

Item 3d. I give and bequeath unto my wife, Elizabeth Russ, the following slaves: Nancy and her four children, John, Angelina and Jane, and Louisa and her child Sophia, for and during her natural life, and, at her death, it is my will that said slaves belong to my step-son, *E. L. M. Ataway*, and if he should depart this life without heirs of his body, then the said slaves to belong to my children Mary E. and Margaret B. Russ.

Item 4th. I give and bequeath unto my wife, Elizabeth Russ, the tract of land on which my residence, near Marianna, is situated, and all that part of the East half of the Northwest quarter of section 4, in township 4, range 10 North and West, lying East of the branch running through the same; to have and to hold the same for and during her natural life, and at her death, it is my will that the said land belong to my children Mary E. and Margaret B. Russ, their heirs and assigns forever.

Item 5th. I give and bequeath to my said wife my carriage, a pair of good horses and all my household and

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kitchen furniture, and, at her death, to belong to my children Joseph W., Mary E. and Margaret B. Russ.

Item 6th. I give and bequeath unto my son Joseph W. Russ, his heirs and assigns, all that part of the East half of the Northwest quarter of section four in township four, range ten, North and West, lying West of the branch running through the same; also the following slaves Will, Maria and her three children, William, Mary Jane and John; Dorah and her children, Madison, Charlotte, John, Emanuel, Harriet, Hammon, David and Henrietta; Paul and Eliza, and the future increase of the said female slaves.

Item 7th. I give and bequeath unto my daughter, Mary E. Russ, and the heirs of her body, the following slaves: Rebecca, Jack, Linda, Alfred, Judy, Louisa, Betsy, Jacob, Adam, Peter, Oliver, Jim, Dido and her two children Henry and Ebenezer, and Gummer, and the future increase of the said female slaves.

Item 8th. *I give and bequeath unto my daughter, Margaret B. Russ, and the heirs of her body, the following slaves: Penny and her three children, Elsy, Edward and Rebecca; Sarah, Ann, David, Walton, Joe, Little William, Little Paul, Ben, Dinah, Susan, Anderson, Prince, and Gib, and the future increase of the said female slaves.*

Item 9th. I give and bequeath unto my wife the tract of land purchased by me of McQuagge and White, to have and to hold the same during her natural life, and, at her death, to belong to my children, Margaret B. and Mary E. Russ, their heirs and assigns.

Item 10th. I give and bequeath unto my children, Joseph W. Russ, Mary E. Russ and Margaret B. Russ, all my real estate not herein otherwise disposed of, to be equally divided between them, share and share alike: to have and to hold the same unto them, their heirs and assigns, forever.

Item 11th. I give and bequeath unto my son, Joseph W. Russ, his appointee and assigns, the following slaves, viz:

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Mary and her three children, Jim, Sophia and Robert, with future increase of said female slaves; but upon special trust and confidence and for the use and purpose hereinafter mentioned; that is to say, that the said Joseph W. Russ shall hold and possess said slaves and their future increase, hire, proceeds and profits of the same for the sole separate use, benefit and behoof of my *grand-daughter, Mary Jane Russ, daughter of William H. L. Russ*, for and during her natural life, free from the use, management and control of any husband she may hereafter have, and independently of said husband, and not in any event to be subject to the debts or contracts of such husband, and that the separate receipt of my said grand-daughter, given while single or married, shall be a legal and sufficient charge to the said trustee for the proceeds, hire and profits of said slaves, when paid over to her from time to time; and it is further my will and desire that should my said grand-daughter have a child or children living at her death, then and in that case I give and bequeath the said slaves and their increase, hire, proceeds and profits to said child or children, to them and their heirs forever; but if my said grand-daughter should depart this life without any child or children living at the time of her death, and then in that case it is my will and desire that after my grand-daughter's death the said slaves, with their increase, hire, proceeds and profits, *to belong to my children Joseph W. Russ, Mary E. Russ, Margaret B. Russ*, share and share alike; and if my son, Joseph W. Russ, should depart this life without making an appointment of a trustee to carry into effect the object of this bequest, to make which appointment he is hereby expressly and fully authorized, then it is my will and desire that the Judge of the Superior Court of Jackson county, Florida, for the time being, shall appoint a trustee, who shall hold said property upon the same trust and confidence and to and for the same use and purpose as the same is hereby bequeathed to my son Joseph

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W. Russ, trustee as aforesaid; and it is my direction that my executors deliver to said trustees the said property when my grand-daughter marries or attains the age of twenty-one years, if my estate should not be sooner settled or divided.

Item 12th. I give and bequeath unto my wife one-third part of my cattle, to be delivered when my estate is divided; and it is my will, that all my stock of cattle, hogs, mules, horses and plantation tools in the hands of my executors, when my estate is divided in pursuance of the next succeeding clause of my will, except the one-third of the cattle, belong to my son Joseph W. Russ.

Item 13th. It is my will that all my slaves, except those given to my wife and to my son Joseph W. Russ, as trustee, be kept together on my plantation, and that the plantation be continued and farmed as during my lifetime, until my debts are paid, unless my daughters, or either of them, should before that time marry or attain the age of twenty-one years, in which event my executors may deliver to her or them, her or their respective portions, she or they paying her or their respective parts of the debts then due, or giving my executors satisfactory security for such payments.

Item 14th. *It is my will, that in the event of the death of Joseph W. Russ, Mary E. Russ or Margaret B. Russ without heirs of their body of the one so dying, that his or her property be equally divided between the survivors of them.*

Item 15th. It is my will, if any property hereby bequeathed to my children should be sold by me or by my executors for the payment of my debts, that my executors make up to said child or children the amounts so sold by contribution from the portions of the other children.

I hereby appoint my wife, Elizabeth Russ, executrix, and my son Joseph W. Russ and my friend Thomas M. White executors, of this my last will and testament.

In witness whereof, I hereunto set my hand and affix my

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seal, this eleventh day of February, in the year of our Lord one thousand eight hundred and forty-five.

Signed, JOSEPH RUSS, [SEAL.]

The bill further sets forth, that the said Elizabeth Russ departed this life some time in the year 1857; that at the death of the said Joseph Russ, he left the following children surviving him, viz: Joseph W. Russ, who was appointed one of his executors, Mary E. Russ, who has since intermarried with Henry Humphreys and Margaret Belle Russ.

The bill avers, that the complainant is grand-daughter of the said testator, (Joseph Russ,) being the only child of William H. L. Russ, the son of the said Joseph Russ, who *had departed this life in the lifetime of his father, the said Joseph Russ* and that *if the said Joseph Russ had died intestate*, the said Joseph W. Russ, Mary E. Russ, Margaret B. Russ and *complainant* (Martha J. Russ) would have been entitled to distribution of his estate; that Elizabeth Russ, the widow, and Joseph W. Russ, Mary E. Russ, now Mrs. Humphreys, and Margaret Belle Russ, *his children, were made the principal objects of his bounty* by his willing and devising to them the bulk of his estate.

The bill further alleges, that since the death of the said testator, the said Margaret B. Russ departed this life a minor, not having attained twenty-one years of age, *and without issue*; that administration upon her estate has been granted to the said Joseph W. Russ; that her estate is in a situation to be distributed, and that distribution should be made between the said Joseph W. Russ, Mary E. Russ and *complainant, as the next of kin and heirs of said Margaret B. Russ, deceased*, they being her heirs and distributees by the laws of Florida.

The bill charges, that some real and personal estate that was willed and devised to the said Margaret B. Russ by her father was sold to pay the debts due by the estate of the said Joseph Russ, deceased, what property or how much

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complainant is unable to state; but that by the terms of the will of the said Joseph Russ, his other children, Joseph W. Russ and Mary E. Humphreys, are bound to contribute to the estate of the said Margaret B. Russ, to make up in value the amount for which said property, given her, was sold.

It is further charged in the bill, that, by the terms of the will of the said Joseph Russ, deceased, the father of Margaret B. Russ, the said Margaret B. Russ, took an *absolute* estate in the slaves bequeathed her by her father's will and named therein, and also in the increase of the females and that she took an *absolute fee simple* title to the land devised to her by her father's will.

The bill further alleges that after the death of Elizabeth Russ, the widow of Joseph Russ, deceased, there was some division of the negro slaves and their increase that were given by said will to the said Elizabeth Russ for life and at her death to be divided between the said Mary E. Humphreys and Margaret B. Russ but how and in what manner said division was made, or what negroes were allotted to the said Margaret B. Russ, she does not know.

The prayer of the bill is, that said Joseph W. Russ do account, as administrator of Margaret B. Russ, deceased, for all property and assets of the estate of Margaret B. Russ; that the land belonging to Margaret B. Russ at her death be partitioned, by order of the court, between *complainant*, Joseph W. Russ and Mary E. Humphreys, if it can be done, if not, sold for the purpose of distribution; that a reference be had to a Master for an account between the administrator Joseph W. Russ and the said estate of Margaret B. Russ, and that a distribution of the estate of Margaret B. Russ, deceased, be decreed between *complainant*, Joseph W. Russ and Mary E. Humphreys.

To this bill the defendants demurred, and afterwards the Chancellor made the following decree:

"This cause having been previously argued and submitted

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on defendants' demurrer, and the court now being fully advised of its decree to be rendered herein, it is considered, ordered, adjudged and decreed that the said demurrer be overruled."

Whereupon the defendants prayed an appeal.

The petition of appeal prays the reversal of said decree for the reasons following:

1. Because your petitioners are entitled to all the real and personal property which came to the said M. B. Russ upon the death of her mother under and by virtue of the will of her father.

2. Because they are entitled to one-half part or interest of the said M. B. Russ in the real estate which was bequeathed to the said M. B. Russ under and by the said will.

3. Because they are entitled to all the property named in the 8th clause of said will by virtue of the limitation contained in the 14th clause of said will.

4. Because their said demurrer ought to have been sustained.

A. H. Bush for appellants.

The proper determination of this question renders necessary the consideration of the far-famed and celebrated rule in "Shelley's case." The rule has been thus defined:

"Where the ancestor takes an estate of freehold, either legally or equitably, by deed, will or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality to his heirs or the heirs of his body as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." 4 Kent, 216.

If the 8th clause of this will stood by itself, I admit

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that it would be within the rule; but I contend that each and every part of this will should be construed together, so that, if possible, each part may be sustained and form together a consistent and connected whole. "*Ut us magis valeat quam pereat.*"

"The intention of the testator is the pole star by which the court should steer in construing wills;" "and we must take the whole will, and as the former words may be enlarged by the latter, so they may be also sustained and qualified or explained by the latter. We are not bound to give an absolute technical sense to one part of the language and then reject all other parts as inconsistent with it."—4 Kent, 534; Selden vs. King, 2 Call, 89; 1 Jarman on Wills, 427, 428, 437, 411; Covenhoven vs. Shaler, 2 Paige, 122; Lynch vs. Hill, 6 Munf., 114; Doe ex. dem. Wolf vs. Allcock, 1 B. & Ald., 137; Moseley vs. Massey, 8 East, 149; Sisson et al. vs. Seabury, 1 Sumner, 235, where Justice Story sums up as follows: "And I would add that in all cases of this sort, if the intention be clear, no authority applicable to other wills ought to preclude the court from carrying that intention into effect, if it can be done without destroying the settled principles of the law;" page 258.

And our own Supreme Court says, that to arrive at the import of a will, and that it may be better understood, we may reject expletives and general expressions and throw the three clauses into one.—Merritt and wife vs. Brantley, 8 Flo., 229. Just what should be done in this case. Throw all the clauses into one, and let each clause which affected M. B. Russ be read in connection with the fourteenth clause. It will then be extremely clear what was the intention of the testator.

Again, the rule in "Shelley's case" is so exceedingly technical and artificial in its nature, that whenever there has been any, the slightest, difference of phraseology which would justify a departure from the rule, the Judges have

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seized upon the opportunity of deviating from it in order to arrive at the real intention of the testator.—See Chief Justice Wilmot's severe criticism of the rule referred to in Mr. Emmett's argument in *Anderson vs. Jackson*, 16 Johns. R., 387-8; *Doe vs. Collis*, 4 Term R., 294, 299. And even Mr. Justice Blackstone was forced to admit that the rule should be controlled by the manifest intention of the testator, for the reason just stated.—Hargrave's Law Tracts, 489, *et vide etiam* *Royal vs. Eppes*, 2 Munf., 482, And to the same effect are many of the cases hereafter cited.

Again, I contend that the rule in "Shelley's case" does not apply, because the several clauses of this will form executory devises and executory bequests.

"An executory devise is a limitation by will of a future contingent interest in lands, contrary to the rules of limitation of contingent estates in conveyances at law."—4 Kent, 263.

It differs from a remainder in several important respects:

1. It requires no particular prior estate to support it.
2. By it a remainder may be limited after a fee.
3. By it an estate less than a freehold may be limited after a life estate.—2 Blackstone, 173 *et seq.*; 2 Kent, 266, 269, 270.

And to show that this is an executory devise, I refer to the following English authorities: 1 Jarman on Wills, 778, 780; 2 Roper on Legacies, 1528, 1529, 1546, 1548, 1549, 1550; *Pinbury vs. Elkin*, 1 P. Wms., 432; *Higgin vs. Dowler*, *ibid.*, 98 and notes; *Hugh vs. Sayer*, *ibid.*, 534; *Pleydell vs. Pleydell*, *ibid.*, 747; *Forth vs. Chapman*, *ibid.*, 666; *Stanley vs. Leigh*, 2 P. Wms., 686, defines the word "perpetuity;" *Sheffield vs. Lord Orery*, 3 Atkyns, 283 *et seq.*; *Marsh vs. Marsh*, 1 Bro. Ch. R., 293; *Davy vs. Burn-sall*, 6 Term R., 30; *Doe vs. Collis*, 4 Term R., 294; *Porter vs. Bradley et al.*, 3 Term R., 143; *Roe vs. Jeffreys*, 7 Term R., 589; *Ranelagh vs. Ranelagh*, 2 Mylne & Keene, 441;

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Crowder vs. Stone, 3 Russell, 217; 3 Cond. Eng. Ch. 369; Atkinson vs. Hutchinson, 3 P. Wms., 258; 4 Meeson & Welsby, 101.

And to the following American cases: 4 Kent, 266; Jackson vs. Chew, 12 Wheaton, 153; 6 Cond. R., 489, which alludes to and comments upon the New York cases; Fostick vs. Cornell, 1 Johns. R., 440; Moffatt vs. Strong, 10 Johns. R., 13; Jackson vs. Staats, 11 Johns. R., 337; Jackson vs. Blanshan, 3 Johnson's Reports, 292, 299; Zollicoffer vs. Zollicoffer, 4 Dev. & Battle, 438; Treadgill vs. Ingram, 1 Iredell, 577; State vs. Norcum, 4 Iredell, 255; Skinner vs. Smart, 3 Iredell, 155; Gordon vs. Holland, 3 Iredell's Eq., 362; Gregory vs. Beasley, 1 Iredell's Eq., 25; Den vs. Cox, 3 Dev., 394; Swan vs. Rascoe, 3 Iredell, 200; Dunn et uxor vs. Bray, 1 Call, 338; Selden vs. King, 2 Call, 72, 89, 90, 91; Royal vs. Eppes, 2 Munf., 479; Cordle's adm'x vs. Cordle's ex'r, 6 Munf., 455, 301-2; Didlake vs. Hooper, Gilmer, 194; Gresham vs. Gresham et al., 6 Munf., 187; Keating vs. Reynolds, 1 Bay, 79; Dott et al. vs. Wilson *ibid.*, 452; Beard et al. vs. Rowan, 9 Peters, 301; Bell et uxor vs. Hogan, 1 Stewart, 536; Milledge et al. vs. Lamar et al., 4 Dess, 617, 623, 630; Jones vs. Price, 3 Des., 163; Badger vs. Harden, 6 Rich., 147; Morgan vs. Morgan, 5 Day, 517; Johnson vs. Johnson, 16 Eng. Law and Eq., 554; Spruill vs. Moore, 5 Iredell's Eq., 284; Hart vs. Thompson, 3 B. Monroe, 486 *et seq.*; Newell vs. Newell, 9 S. & M., 56; Rucker vs. Lambkin, 12 S. & M., 230, *ibid.*, 684.

The term "survivors" will be found to rescue the case from the operation of the rule in "Shelley's;" for it could not have been intended that the survivor would take only after an indefinite failure of issue, as that might happen long after the death of the survivor. Another reason why a limitation to survivors was treated as an executory devise is, that, after a fee simple, there could be no remainder, except by way of executory devise.—4 Kent, 277, note a 279 and

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note and the cases cited above from 1 Johns. R., 450; 11 Johns. R., 347; 10 Johns. R., 16, 17; 4 Dev. & Bat., 438; 1 Iredell, 577; 1 P. Wms., 534; 2 Mylne & Keene, 441; 3 Russell, 217.

To show that this limitation applies to all the property, I would refer to the following cases: Garland & Watt, 4 Iredell, 287; Jackson vs. Staats, 11 John. R., 337; Moffatt vs. Strong, 10 Johns. R., 13; Stopford vs. Stopford, 5 East., 501; Petway vs. Powell, 2 Dev. & Bat. Eq., 308; Zollicoffer vs. Zollicoffer, 4 Dev. & Bat., 438.

This limitation is good, because it is to the survivors only and was intended as a personal benefit to them.—Timberlake and wife vs. Graves, 6 Munf., 174, 301; Gresham vs. Gresham et al., *ibid.*: 187; 2 Roper on Legacies, 1547, 1549; Barksdale vs. Gamage, 3 Rich., 271; Shepherd vs. Shepherd, 2 Rich., 142.

That in a previous part of the will a fee simple was created makes no difference, as will fully appear by reference to the following cases, which have been already cited: 3 Term R., 143; 2 P. Wms., 686, 688, 689; 7 Term R., 589; 12 Wheat., 153; 1 Johns. R., 440; 10 Johns. R., 13; 16 Johns. R., 382; 9 Peters, 301; and see also 1 Jarman on wills, 781.

Again, we have abolished entails in this State, (Thompson's Digest, 191,) and therefore the rule in "Shelley's case" will not apply. That rule was the offspring of the statute *de donis conditionalibus*. 2 Blackstone, 110 to 112; Anderson vs. Jackson, 16 Johns. R., 387, *et seq.*; 5 Rand., 296, 300, and cases cited above from 4 Dev. & Battle, 438; 4 Iredell, 287.

The rule was applied to personal property by way of implication based upon the statute "*de donis*," and that statute having been destroyed by our statute abolishing entails, there is now nothing to serve as a foundation on which such implication can rest.

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Again: The courts lay hold with avidity of any circumstance, however slight, and create almost imperceptible shade of distinction, to support limitations over of personal property. *Fearne on Executory Devises*, by Powell, 186, 239, 259; 4 Kent, 281, 282, 283 and notes; *Rhodes vs. Jones*, 4 Iredell, 53; *Atkinson vs. Hutchinson*, 3 P. Wms., 258; *Jones vs. Price*, 3 Dess., 165; *Moffatt vs. Strong*, 10 Johns. R., 16; *Burnett vs. Bowber*, 2 Hill, (S. C.,) 543, 552; *Cook vs. Devander*, 9 Vesey, 197, 204, and the following references hereinbefore given, viz: 1 P. Wms., 666, 563, 747, 750, 535; 1 Call, 338.

Yonge, McClellan & Barnes for appellee.

We insist, in behalf of the appellee, that the rule in *Shelley's* case, as decided by the court below, does govern the disposition and limitations contained in the will now before the court for construction, and that it does appear by the terms of the will that it was the intention of the testator to create an estate tail in the disposition of this property, and that, aside from his apparent intention, the rules of law affix a meaning and signification to the words used in the will that gives an estate tail; that the words used in the 8th clause, viz: "I give and bequeath unto my daughter, Margaret B. Russ, and the heirs of her body," are such as to create an estate tail in the first instance, and this, we take it, is so beyond cavil. 4 Kent's Com., 11 and 12.

But it is insisted by the appellants that this clause of the will is not to be read by itself, but must be taken in connection with the 14th clause in the will; and, for the present, we will concede that such is the proper reading of the will. Now, does the language used in the 14th clause of the will destroy the estate tail which is clearly created by the language used in the 8th clause? We think not; for we find in the 13th clause the same technical language which creates an estate tail that is used in the 8th clause, in this,

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that the words used in the 14th clause are, “in the event of the death of J. W. R., M. E. R. or Margaret B. Russ (the legatee in the 8th clause) without heirs of the body,” that the property of the one so dying (which in this case is Margaret B. Russ) is to be equally divided between the survivors.

The same language being used in the 14th clause that is used in the 8th clause and also in the 7th clause, where property is given to his other daughter, Mary E., indicates that it was the intention of the testator to create an estate tail as to the property given to his daughter, and such intention being repugnant to the rule, the limitation is too remote and therefore void, and the first taker took an absolute property, and, upon her death, passed distributively to her next of kin. *Danielson vs. Williamson*, 12 Wheaton, 568; 7 Curtis, 362; *Broom’s Legal Maxims*, 123; 2 *Jarman*, 418, 444, 448.

But it is insisted by the appellants that the word “survivors,” used in the 14th clause, is to be taken in this will as a word superadded to and intended to control the words of indefinite limitation in the 8th clause, “heirs of her body,” and, in the 14th clause “without heirs of the body of the one so dying,” and to confine that limitation to children living at the death of Margaret B. and Mary E. Russ. But this cannot be so, according to Chancellor Kent, for he lays it down as a rule, that if the executory limitation, either of lands or chattels, be too remote in its *commencement*, it is void, and cannot be helped by any subsequent event, or by any modification or restriction in the execution of it. 4th Kent’s Com., top page 315.

In the case of *Fosdick vs. Cornell*, 1 John., p. 451, where a limitation was held to be a good executory devise, being controlled by the word “survivors,” is admitted in the opinion of the court, that if the intention of the testator had appeared in the first instance to give an estate tail, that

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that intention would have controlled and the limitation would have been too remote.

It is true it has been held in some instances, that in a bequest of chattels, slight and unimportant words in the will may be taken hold of to ascertain, where the intention of the testator is not clearly expressed, his intention to limit the estate over.

But this rule could only apply when the intention of the testator is not clearly expressed in any event. The English rule seems to be, and such is the rule of law here, as recognized in the case of *Watts, adm'r, vs. Clardy*, 2 Flo. Reps., 386, that a devise in fee with a remainder over, if the devisee dies without issue or heirs of the body, is a fee cut down to an estate tail, and the limitation over is void by way of executory devise as being too remote and founded on indefinite failure of issue. Chancellor Kent says that the American authorities are to the same effect. 4 Kent's Com., 276, (9 Paige, 265). Chancellor Kent further remarks that the English rule has been adhered to and has not been permitted, either in England or in this country, to be affected by such variation in the limitation over as "dying without leaving issue;" nor, if the devise was to two or more persons, and either should die without issue, the survivor should take. 4 Kent's Com. 277, (side page.)

We are of the opinion, that, when the cases are examined, it will be found that whenever a limitation over to survivors is held to be good by way of executory devise, they will be found to be cases in which the devisee or legatee in the first instance took an estate in fee or life estate only, and not an estate in fee tail, as in the case at bar; and we deem the cases of *Threadgill vs. Ingram*, 1 Iredell's Reports, p. 577, and *Zollicoffer vs. Zollicoffer*, 4 Dev. & Bat., 438, and *Gregory vs. Beale*, 1 Iredell's Equity, page 25, as falling within the above rule. Where there is a bequest of personal property to A and the heirs of his body, as in the case at

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bar, the same language would, in a devise of real estate of inheritance, giving an express estate tail, and would give an absolute property in the personal property bequeathed, and any subsequent bequest over without theirs of the body would be of no effect, being too remote. 2 Roper on Legacies, page 1521-2-3. And certainly a bequest over to survivors would not have the effect to change a devise of this character, it being a fee tail to the first taker, into an executory devise, or a limitation not too remote. Salked vs. Vernon, 1 Eden, Rep., p. 56; Butterfield vs. Butterfield, 1 Vesey, Sr., 134, (and see note marked *m*, on same page, where it is held, that "where there is an express limitation of a chattel by words which, if applied to a freehold, would create an *express estate tail*, the whole interest vests absolutely in the first taker and the limitation over is too remote; but, where there is no express legal limitation, the court will consider the intention of the testator.") Gray vs. Shawne, 1 Eden's Reports, 112 to 115; Boden vs. Lord Galway, 2 Eden's Reports, 173; see case of Houston vs. Ives, 2 Eden's, 129; Atty Gen'l vs. Hird, Brown Chancery Reports, 156, top page; Bigge vs. Bensly, *ib.*, 174, top p.

In the case of Bell vs. Gillaspie, 5 Randolph's Reports, p. 273, Chancellor Kent says (see 4 Kent, 305,) there was a devise to the sons, and if either should die without lawful issue, was to be divided among the survivors, and that Justice Carr, in delivering the opinion of that court, declared that the testator meant that the land given to each son should be enjoyed by the family of that son so long as any branch of it remained. He did not mean to say, "you have the land of C if he has no child living at the time of his death, but, if he leave a child, you shall not have it, though the child die, the very next hour."

We beg leave to refer to a few of the many American cases which we think parallel and strictly applicable to the

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case at bar. In the case of *Sidnor vs. Sidnor* (2 Munford Reports, 263,) the rule was applied where the language of the will is identical with that in the present case, even to the word “survivors,” and afterwards of *Lynch and wife vs. Hill and wife* (6 Monford, 114,) is to the same point. We would also refer the court to the case of the State for the use of *Lester vs. Skinner*, (4 Iredell, 58,) where the language in the will was almost precisely similar to that in this case. Here the court said: “There can be no doubt that the words in the will would create an estate tail in lands devised;” and it is expressly on this ground that the court decided that the limitation over was too remote, and that J. W. Russ took an absolute estate in the slaves. But, say the court in this case, “an exception to the rule is where there are words superadded to those which, standing by themselves, would create an estate tail in lands, which superadded words would show and explain that the testator did not intend to create an estate tail in the chattels. The superadded words, doubtless, here alluded to are those designated in many of the cases put in 2d Roper on Legacies, 1523—4. It will be seen, by reference to the case of *Anderson vs. Jackson*, in 16 Johnson, that that case was disposed of on the same ground, and followed the case of *Fosdick vs. Cornell*, (1 Johnson, 440,) and that the opinion and decision in *Fosdick vs. Cornell* was made under a mistaken view of the English cases. This will appear by the dissenting opinion delivered by the Chancellor in *Jackson vs. Anderson*, 16 Johnson, who was on the bench when the decision in *Fosdick vs. Cornell* was made, and who says that that case was decided erroneously, and that the courts of New York since then have done nothing but follow up the error ever since.

A limitation over of personal property cannot be made to take effect after the expiration of an absolute interest, whether absolute, expressly or by implication.—See will, items

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2, 4, 5, 6, 7, 8, 9, 10, 11. The devises and bequests in these items are all either absolute, expressly or by implication. A valid executory devise or bequest cannot subsist under an absolute power of disposition in the first taker.—4 Kent's Com. 297 *et seq.*; 10 Johnson, 19; 16 Johnson, 537; Allen vs. White, 16 Ala. Reps., 181. This is because of the repugnancy. The property in many of the items of this will, where the bequest and devise is to J. W. Russ, Mary E. and Margaret B. Russ is to them in fee, is to them, their heirs and assigns. See the bequest to Jos. W. Russ; it is clear he was intended to be vested with such an interest as he could sell and assign. If so, what becomes of the idea that this will contains an executory devise?

We now take the position, that the last clause of the will is not to exclude the prior devises, if it is inconsistent with the general intention of the testator, which is plainly shown by the general context of the will, (2 Will. on Executors, p. 931,) disclosed by the several *independent* and *complete estates* described in *each separate item* of the will conveyed by full and complete technical and legal language.—1 Jarman on Wills, §420; 4 Williams on Executors, §931. See further, as to rule of construction of wills divided into items, 2 Williams on Ex., §929 and 930; Randolph vs. Wendell, 4 Sneed, 668. As to construction of wills and doctrine of remoteness, Campbell vs. Harding, 13 Cond. E. C. R., page 101 *et seq.* 102; *Ibid.*, p. 84, Lepine vs. Ferard; 17 Vesey, page 479; Barlow vs. Saulter, 2 Dess., 111; 2 McCord's Ch., 323; 5 Richardson, 426; 1 Call's Reports, 160, docking entails; 1 Black. Com., 89; 2 Roper, 1527; 16 John. Reps., 402; 17 Georgia, 280; 20 Geo., 699; 15 Geo., 122, 457.

A. H. Bush in reply.

In addition to the authorities already cited, I would refer to the following on the subject of executory devises: Beresford vs. Elliott, 1 Dess., 183; Logan vs. Ladson, *ibid.*, 271;

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Reynolds vs. Calder, *ibid.*, 355; Clifton vs. Haig, 4 Dess., 330; Zimmerman vs. Wolf, 4 Rich., 329; Kelly et al. vs. Calhoun, 8 S. & M., 462, 470; Tillman vs. Sinclair, 1 Iredell, 185; De Treville vs. Ellis, 1 Bailey Eq., 40; Stevens vs. Patterson, *ibid.*, 42; Mayzick vs. Vanderhorst, *ibid.* 48; Henry vs. Archer, *ibid.*, 535; Feemster vs. Smith, Rice, 34; Finey vs. Branson 1 Rich., 78; Yates vs. Mitchell, *ibid.*, 265; McClure vs. Young, 3 Rich., 559; Mathis vs. Hammond, 6 Rich., 339, 88; Carron vs. Kennerly, 8 Rich., 25; Perry vs. Logan, 5 Rich., 205, 206.

The case of Hay vs. Hay, 4 Rich., 378, does not affect me injuriously. It went off on the illegal or void limitation to “the nearest heirs of his body of his mother’s lineage.”—See page 381; and the limitation was void for uncertainty, page 382.

In the case of Chaplin vs. Turner, 2 Rich., 136, the devisee took the property when he attained the age of twenty-one years.

Scanlin vs. Porter, 1 Bailey, 427, was a limitation over in a double aspect, and was void of course, if either took effect.

As to the distinction between real estate and personal property, see, in addition to my first brief, Dean vs. Slater, 5 Term R., 338; Dean vs. Shenton, Cowper, 411; Hill vs. Barrow, 3 Call, 302, 305, 311; 21 English Law and Equity, 369, 5 Rich., 202, 206, 214, top page; 2 Roper on Legacies, 1524, 1527, 1528, 1529, 1523.

But, it is said that the 14th clause of this will is void, because an express estate tail was created in a prior clause of the will. I answer, that here there is no *subsequent* limitation, but it is created at the same time and in the same will, in which it is alleged that the estate tail appears. The signing of the will is “one act, done at one and the same time,” and there can be *nothing in the will subsequent thereto*. The point made by the learned counsel is applicable to something that transpires after the execution of the will—to some

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event or accident outside of the main design.—Atkinson vs. Hutchinson, 3 P. Wms., 259.

The whole will must be taken together.—See references already given, and especially I refer to Merrit and Wife, vs. Brantley et al., 8 Fla., 226; Session vs. Seabury, 1 Sumner, 235, *et vide etiam* Gibson vs. Gill, 2 B. & C., 9 Eng. Com. Law, 110; Wickman vs. Turner, 2 D. & R., 16 Eng. Com., Law, 96; Millen's Digest, (Geo. Rep.,) p. 709, §2; Blamire vs. Gildart, 16 Vesey, 314; Westcott et al. vs. Cady et al., 5 Johns, Ch. R., 334, where a will and codicil were taken and construed together as parts of one and the same instrument; and it is sought to uphold this argument on the ground that each item in this will is a separate will of itself. An answer readily presents itself. The word "item" in a will is construed as a copulative conjunction, as "and" or "also," to connect sentences together. It is only used to distinguish the clauses of the will. But, in this will, the clauses are also numerically arranged. I refer to Reynolds vs. Calder, 1 Dess., 355; 1 Atkyns, 438; 6 Adolphus & Ellis, 166; 33 Eng. C. L., 108; Feemster vs. Roberts, Rice 34; 1 Jarman on Wills, 436; 3 Maule & Selwynn, 58; 5 East., 87.

The following cases will show that, even when estates tail were created, a subsequent limitation over was good: Laddington vs. Kine, 1 Salkeld, 225, and case cited already from 2 Call, 313; 2 Atkyns, 282 *et seq.*; 1 P. Wms., 432, 563, 98, an express estate tail male; 1 Bay, 78; 6 Term R., 30; 7 Term R., 589; 1 Johns. R., 440; 10 Johns. R., 13; 16 Johns. R., 382; 4 Dev. & Bat., 438; 4 Iredell, 225; 1 Iredell's Eq., 25; 2 Munf., 479, 482; 6 Munf. 455, 301, 187, and the South Carolina cases cited in the first part of this brief, and see 2 Roper on Legacies, 1527-8, 1522-3; Woodward vs. Glassbrook, 2 Vernon, 388; Brownwood vs. Edwards, 2 Vesey, Sr., 249.

And very many of the cases show that the limitation was

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contained in clauses subsequent to the others.—*Vide* 1 Johns. R., 440; 10 Johns. R., 13; 16 Johns. R. 382; 4 Dev. & Bat., 438; 2 Munf., 479; 6 Munf. 187; 1 Bay, 78.

To avoid the effect of our statute abolishing entails the counsel reads the case of Carter vs. Taylor, 1 Call, 165, construing the Virginia Statutes 1776 and 1785. Our statute simply abolishes entails, and of course repeals the statute *de donis conditionalibus*. The Virginia statutes continue it in force, and one of them has a restrictive clause abolishing all limitations and conditions in conveyances. See 1 Call, 174, 184; Tate vs. Tully, 3 Call, 307; Hill vs. Barrow, *ibid.*, 297; Cruger vs. Haywood, 2 Dess., 422; Jones vs. Postell, Harper's Law R., 99; Morill vs. Mathews, 2 Bay; 397.

On the question as to when the limitation took effect, I contend that it did so at the death of Margaret B. Russ, and I refer to 7 Term R., 589; 3 Term R., 143; 1 P. Wms., 747; 3 P. Wms., 258; 3 Johns. R., 292, 298; 3 Dess., 163.

But it is said that an executory devise cannot be engrafted on a fee simple. In answer, I refer to 4 Kent, 269, 270; 2 Blackstone, 173; 1 Jarman on Wills, 781, and the many cases cited in my brief.

In answer to the objection that the limitation applies to articles liable to be consumed in the use, I refer to Covenhoven vs. Shaler, 2 Paige, 122.

It is said that a limitation over after the words "heirs of the body" was only applicable to trust estates. Higginbotham vs. Rucker, 2 Call, 313, placed it on no such grounds; and see Royal vs. Eppes, 2 Munf., 479; Zimmerman vs. Wolf 4 Rich., 329, and many other cases cited, in which there was no trust.

Reference is made to Anderson vs. Jackson, 16 J. R., 402, to show that the first taker had a fee simple. This was a dissenting opinion of Chancellor Kent. The decision of the court was the other way.—Page 437.

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To show that the case of Watts vs. Clardy, 2 Florida R., 369, was decided without due consideration, I refer to 4th Kent, 221; Henry vs. Felder, 2 McCord's Ch. R., 342, and the other South Carolina cases cited in this brief.

The North Carolina cases, Whitaker vs. Brantley, 5 Iredell, 225, and Cox vs. Marks, *ibid.*, 361, were on wills made in 1803 and 1808 and decided under a statute of North Carolina which confined the construction to wills made since the 15th day of January, 1828.—Revised Code, 270. See, also, head notes of Lester vs. Skinner, 4 Iredell, 57.

The cases of Sydnor vs. Sydnor, 2 Munf., 263; Daniel vs. Williams, 12 Wheaton, 568; Guerry vs. Vernon, 1 Nott & McCord, 69; Henry vs. Felder, 2 McCord's Ch., 323, and others cited by the counsel, were cases where it did not positively appear that the limitation *must* take place within a life or lives in being. The limitation was not to the *survivor* simply as a personal benefit.

J. M. Gorrie on the same side.

FORWARD, J., after reading the statement of the case prepared by him, proceeded to deliver the opinion of the court.

From the statement of the case, it will be seen that the complainant, who is a grand-child of the testator and the daughter of Wm. H. L. Russ, a son of the testator, who died in the lifetime of the testator and *before* his will was made, and who is the same person provided for in the *eleventh* clause of the will, where she is called "Mary Jane Russ," claims to be entitled as one of the next of kin to a distributive share in the estate which Margaret B. Russ took under the will of the testator upon the ground that the said Margaret B., by a proper and legal construction of her father's will, took an estate in fee in all the real estate and absolutely all the personal property which she derived from

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said will; that in legal construction the words "heirs of her body," in the bequest in the 8th clause of the will, mean an indefinite failure of issue, and that, upon this bequest, if the statute of this State for abolishing entails had not been passed, Margaret B. Russ would have been seized in *fee tail* of one undivided third part of the premises, real and personal, as one of the first takers, under the rule in Shelley's case, which is:

"Where the ancestor takes an estate of freehold, either legally or equitably, by deed, will or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs or the heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestors to the whole estate."—1 Coke Rep., 93; 4 Kent's Com., 216; 2 Jarman on Wills, 243.

The word *heirs* is a word of limitation, i. e. the ancestor takes the whole estate comprised in this term. Thus, if the limitation be to the heirs of his body, he takes a *fee tail*; if to his heirs general, a *fee simple*.

The defendants take the position, that, by a fair and legal construction of the will, all the property given by it to Margaret B. Russ, at her death became the property of her surviving brother and sister, Jos. W. and Mary E. Russ, under and by virtue of restricting words and expressions therein used, from which it can be collected that these words, "heirs of her body," are used in a more confined sense, whereby a precise time is fixed by the will for the failure, making it a *definite* failure of issue, *excluding* the bequest and devise from the rule in Shelley's case and bringing the same within the rule as to executory devise, which is, "that an estate cannot be entangled by executory devise beyond a life or lives in being, and the further period of twenty-one years,

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and so much over as will meet the case of a posthumous child.”—10 Bingham, 140; 4 Kent Com., 267.

It is contended, that the superadded words, in the 14th clause of the will, define the *intention* of the testator and should be made to supply the words “living at the time of the death” of said Margaret B. Russ, and construe the words “heirs of the body” to mean children.

It is argued, that, in construing the will, the whole will must be taken and considered together, and that the two clauses, the 8th and 14th, should be thrown into one. The two clauses of the will upon which the question of title depends, and are presented for our consideration, thrown into one, read as follows, viz: 8th item. *“I give and bequeath unto my daughter Margaret B. Russ, and the heirs of her body, the following slaves: Penny and her three children, Elsey, Edward and Rebecca, Sarah Ann, David, Walter, Joe, little William, little Paul, Ben, Dinah, Susan, Anderson and Gib, and the future increase of said female slaves.”* 14th item. *“It is my will, that in the event of the death of Joseph W. Russ, Mary E. Russ or Margaret B. Russ, without heirs of their body of the one so dying, that his or her property be divided equally between the SURVIVORS OF THEM.”*

The question for this court is, whether the bequest to Margaret B. Russ comes within the rule in Shelley’s case, or whether it will take effect as an executory devise?

The intention of the testator is the polar star to guide in the construction of a will, which intention does not depend on any particular clause standing by itself, but is to be gathered from the whole will taken together; and where the testator’s intention is manifest it must prevail, if it is not contrary to some positive or settled rule of law.

The learned counsel on both sides have exhibited extraordinary research, and in their arguments and briefs have with great ability cited cases and elementary books which almost

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exhaust the subject. As their briefs will be abridged and furnish the reporter to be printed with this decision, we hope we may be excused for enumerating only those authorities cited which are deemed essential in expressing the opinion of the court and the grounds upon which their decision is based. Having laid down the rule for the construction of this will, the question is, whether there are expressions or circumstances, or both, from which it can be collected that the words “without heirs of the body,” and heirs of the body, are used in a more confined sense, and therefore are not to have their legal signification: namely, death without issue generally.

The words “heirs of the body” are said to be words of art and import heirs *ad infinitum*, if nothing to restrain is superadded. To *restrain* here is meant superadded words which fix a definite time for the failure of issue, such as heirs *living at the time* of the death of the legatee. The rule in Shelley’s case is not applicable where the testator used the word “heirs” in any other sense than the legal one.

This will of Joseph Russ, dec’d, presents the case of a father and head of the family providing for his entire household. He begins by making provisions for his wife, secures to her a life estate with remainder to his children, one of his sons being *then* dead but leaving a child, (the complainant in this suit.) He provides for the grand-child as he did with his own children. He also makes provisions for a stepson, and for his living children. Being, as it would seem, desirous that all who have equal claims upon him, and who stand equal in his affections, should have his property, he limits it “to heirs of the body,” and by the 14th and final clause, superadded words to show that the benefit intended by him to his children was clearly future and contingent, because they were to take as *survivors*, and as survivors they were to take when any one of them should die without heirs of the body living at the time of the death. The pre-

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cise time is fixed for the failure of heirs. It was at the time of the death of any *one* of them. Who would be the *survivor* was a contingency. Could any one of the children have disposed of this property before this contingency happened, to wit: the death without heirs of the body living at the time of the death of one of them? No. Why? Because, up to the time the contingency happened they had but a life estate. The power of alienation was restricted by the intestate until the death of one of them. He entangled the estate of his children, but he did not entangle it beyond a life or lives in being. Thus he was within the rule of an *executory devise*.

In taking the will as a whole, what did the father mean? We think from the expression and situation of the children contained in the will, he meant to *give* this property to his three children mentioned in his said will: one-third to Margaret B., his daughter, and to her posterity, if she has any at the time of her death, but, if she has no children, (heirs of her body,) he then meant the property so devised and bequeathed should go to his surviving children Joseph and Mary, to be equally divided between them. If Mary had died first without children, then to be equally divided between his surviving children Joseph and Margaret; or if Joseph had died first without children, then to be equally divided between his surviving children. He limited the estate up to the death of one of them to a life estate. The contingency was the death of one of them, and the remaining two children, if they took the estate of the deceased sister at all, it was as *survivors*. It seems to us the testator said to his three children, who were equally dear to him: Now, if one of you die without children at the time of the death, then the two who shall survive shall have the share of the one that dies; but if “the one so dying” shall leave at the time of “his or her” death any child or children, then “*his or her property*” shall go to the children of the one so dying. Your right to the property “of the one so dying”

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will be determined when the contingency upon which it depends happens, to wit: at the death of any one of you. Until that contingency happens, so that it may be determined whether you have the share thus willed to the one of you so dying, I restrict the alienation of any of your bequests. That is to say, you can none of you alienate the portion I have willed to you until one of you dies. *During the life of all of you in being* your bequests are entangled. Had he used the term "children" in his will instead of "heirs of the body," no one could have doubted his intention.

We think the intestate intended that if either of his three children should die without issue living at the time of the death of the one dying that the whole property devised to the three should pass to the *survivors* as survivors of them forever, to be equally divided between them.

Having thus defined what we think was the plain and manifest intention of the intestate, we are next to enquire whether this intention must prevail, or whether it is contrary to some positive or settled rule of law converting the intention of the testator to a *purpose altogether different* from what he intended? Here is the turning point of this whole case. There is no difference of opinion as to the law arising under the rule in Shelley's case. The multiplicity of cases cited agree on that. The difficulty which has arisen, and which so much bewilders courts, is the application of that law; and here we would remark there is a difference between *exceptions* to the rule and *exclusions* from the rule.

It is observed that Mr. Hays, in his very clear and able essay on the disposition of real estate, that the cases which might appear at first sight to furnish exceptions to the rule are not cases of exceptions, but of *exclusions*—cases in which there was no such limitation as the rule intends.

It is said the words "heirs of the body" are words of *art*, and it certainly cannot fail to strike one who may take

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pains to read the many cases where it is attempted to bring these words within the technical rule and thereby frustrate the purpose of the testator, that they are *artfully* used; and so common is the thought, where the words "heirs of the body" are used, that the sight alone of those words is enough, without further examination, to establish an *entailment*.

We think, if the rule as to executory devise be kept before us in expounding the will of Joseph Russ, deceased, there can be no difficulty of bringing it within that rule and excluding this will, from the rule in Shelley's case. It will be seen, if we are right in the force to be given to superadded words, the essential quality to support an executory devise exists, namely, in definitively limiting the time when the contingency should happen, to wit: at the death of either of them without heirs of the body, clearly indicated by the words "*survivors of them.*"

Before entering upon the authorities which we think sustain us in construing this to be an executory devise, we will give certain rules to guide us, viz: The construction of the will is to be made on the entire testament, and not merely on disjointed parts of it, and consequently all its parts are to be construed with reference to each other. Hence general words in one part of the will may be restrained in cases where it can be collected from any other part of the will that the testator did not mean to use them in their general sense.—2 Williams Ex'rs, 927; Douglas, 327. Which was done in Merritt and wife vs. Brantley et al., 8 Florida, 229. See opinion of Chief Justice. See also other cases cited.

In the English Court of Chancery, decided as late as 1853, (see 21 volume English Law and Equity Reports, page 369,) the Vice Chancellor says: "Words importing a gift to issue, or a gift over on failure of issue, when applied in a will to personal estate, receive a different construction from that which they would receive if applied

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to real estate. The difference of construction, well established from the case of Forth vs. Chapman, 1 P. Wms., 664, has qualified the general rule that words which, if applied to real estate, would give an estate tail, when applied to personality give the absolute interest. But the distinctions arising from this qualification of the general rule have, in some of the reported cases, unfortunately been overlooked. The reverse of this qualification of the general rule is that the operation of law, independently of express direction, make real estate descendible, but makes personal estate distributable. The qualification of these rules has therefore been made in order to prevent the intention of testators from being defeated. A testator who gave personal estate to one for life and then to his issue, but if the tenant for life should die without issue, then to another, would, but for this qualification of the general rule, be held to give, not a life interest, but the absolute property to the person whom he described as tenant for life, and the issue, express objects of his bounty, would take nothing by gift from him. The principle of the qualification was to prevent the intention of the testator from being defeated. In a deed, the word 'issue' is a word of purchase. In a will, it is not *ex vi termini* to be construed as a word of limitation, but is, generally speaking, *to be construed as a word of purchase or limitation, as may best suit the intention of the testator.*" So in a will in the United States, where estates tail are abolished, the word "heirs of the body," when found in such a connection, whether the property willed is personal or real estate, or both, as to lead to the belief the testator meant to confine the failure of issue to a fixed time, the devise must be held good as an executory devise.

Having laid down these general rules, we proceed to the authorities.

In Hughes vs. Sayer, 1 P. Wms., 584, there was a devise of personal estate, and the surplus of it was given to two

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nephews, and upon *either dying without children, then to the survivor*. The Master of the Rolls held the devise over good; for the devise must be taken to mean children living *at the death* of the party, and not a general failure of issue, because the immediate limitation over was to the survivor.

In *Porter vs. Bradley and others*, 3 T. R., 143, the court held, that “if lands be devised to A, his heirs and assigns forever, and if he *die, leaving no issue behind him*, then over, the limitation over is good by way of executory devise.” Lord Kenyon, Ch. J., in deciding this case, says: “If indeed only the first words, ‘leaving no issue,’ had been used, they, according to the opinion of Lord Macclesfield, in *Forth vs. Chapman*, must be restrained to leave issue at the time of his death. And there are even additional words in this case, ‘leaving no issue *behind him*,’ which necessarily import that the testator meant at the ‘time of his son’s death.’ Therefore I have not the least doubt but that this is a good executory devise, to take place within the time allowed by law, which is borrowed by analogy from legal formal limitations, namely for a life of lives in being.”

In *Roe ex dem. vs. Jeffrey*, 1 Term. Rep. 589, the court of King’s Bench held that “under a devise to T. F. and heirs forever, and in case he should depart this life *and leave no issue*, then to E. M. and S., or the *survivor or survivors* of them, share and share alike, the devise is a good executory devise.”

In *Atkinson vs. Hutchinson*, 3 P. Wms., 261, the Lord Chancellor says; “The dying without issue being confined to a life, makes the limitation over good by way of executory devise.”

In a case decided in the English Court of Chancery as late as 1832, (see *Ranelagh vs. Ranelagh*, 2 Mylne & Keene, 441,) the words of the will were: “*In case of the demise of any of the above parties without legitimate issue, their, his or her proportions to be divided equally amongst the survivors.*” Held,

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“that the presumption *prima facie* is that the testator had not in his contemplation an *indefinite failure of issue*.” The Master of the Rolls says: Although the word “*survivors*” has been sometimes construed as synonymous with “*others*,” where the context required it, that is by no means its natural and ordinary, far less its necessary import. The word “survivors” must be referred, not to the time of the testator’s death, but *to the period of distribution*. The word “issue,” as it occurs in this codicil, is synonymous with “children.”

The words of the will in *Forth vs. Chapman*, 1 P. Wms., 664, were: “And if either of his nephews, *William or Walter, should depart this life, and leave no issue of their respective bodies*, then he gave the said premises to the daughter of his brother William, Jane, and the children of his sister, Sibley Price,” upon which the question arose whether the limitation over the leasehold premises to the children of the devisor’s brother and sister *was void as too remote*.

Chancellor Parker said: If I devise a term to H, and if H die without leaving issue, remainder over, in the vulgar and natural sense, this must be intended if H. died without leaving issue at his death, and then the devise over is good; that the word “die” being the last antecedent, the words “without leaving issue” must refer to that. Besides, the testator, who is *inops concilii*, will, under such circumstances, be supposed to speak in the vulgar, common and natural, *not in the legal sense*. The court held this a good limitation to C, if A or B left no issue at their death.

In the will under consideration in the case of *Glover vs. Monckton*, 3 Bing., 13, there was a devise of real and personal estates, in the first instance for the benefit of the son and daughter of the testator, *until they attained twenty-one*, or the daughter married, and then to raise £5,000 for her, and then to his son, his heirs, executors, administrators and assigns forever, according to the respective nature of the es-

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tates; but as to his real estate, in case his son should not live to attain twenty-one, and his daughter should be living at his decease, or in case his son should live to attain such age, and should afterwards *die without lawful issue* then to his daughter for life, &c., the Court of Common Pleas certified to the Master of the Rolls that in their opinion the son took an estate in fee in the real estate, with an executory devise over in the event of his dying without issue living at his death.

Mr. Jarman, in his Treatise on Wills, says with reference to the principle in *Glover vs. Monckton*: The same principle probably would be considered as extending to any case in which a *dying without issue* is combined with an event personal to the individual, as the *event of his dying without issue* and unmarried, or without leaving a husband or wife, (which is the meaning of unmarried “in this situation.”) The case of *Doe ex dem. Johnson vs. Johnson*, decided in the Court of Exchequer in 1852, (see 16 English Law and Equity reports, page 552, is another case in which “dying without lawful issue” was held a *definite* failure of issue.

Having noticed the English cases we will now turn to American decisions on this subject.

The early cases in Virginia made a difference in the restriction of limitation by superadded words between real and personal estate, and in the case of *Royal vs. Eppes*, 2 Mumf., 479, held the word “*then*” in respect to a devise over of personal property, viz: negroes, a special word, that would justify the adoption of the respective construction.

In *Dunn and wife vs. Bray*, 1 Call, 294, the devise was of slaves and real estate to W. and his heirs forever; but if he die and leave no issue, *then* to C. This limitation to C, so far as slaves were included, was held good as an executory devise, and not too remote. The word *then* was construed to operate as a definite failure. The court also held in this

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case that in order to annex slaves to lands, it was necessary that *co-extensive estates* should be given in both. The next case was Sheldon vs. King, 2 Call, 61, in which there was a divided court, but the majority defined out of the case before them what shall be construed an estate tail and not an executory devise. The testator devised that if his wife be with child, and the said child *lives* and prove a *male child*, and lives to twenty-one years of age, a house shall be built, &c., and after the decease of his mother, then he gives *him* and the heirs of his body all his lands, houses and appurtenances, both real and personal, forever; but if the child proves a female, and lives to twenty-one or marriage, she shall have one-half his personal estate and all his lands to her and the heirs of her body forever. But if the said child should die, then he gives to his *wife* and her heirs forever all his lands, slaves, stocks of cattle, &c., and appoints her and her father executors of his will. The child proved to be a daughter. Held, that on the birth of the child she had a vested *remainder* in tail, with remainder in fee to testator's wife. Pendleton, President, differed with the majority of the court as to the intention of the testator, and thought it an executory devise of the fee to the wife upon the contingency of the son's dying without issue under age, or a daughter dying under age unmarried, and which he says he conscientiously believed was his intention.

The case of Higgenbotham vs. Racker, 2 Call, 265, was next, and this case was not a will, but deed gift, in which A makes a gift of slaves to his daughter, and *the heirs of her body*, and, in case she died without issue—that is children of her body—the said slaves to return to the grantor: Held this limitation not too remote, and therefore is good.

In North Carolina, in the case of Garland vs. Watt, 4 Iredell's Law Rep., page 287, a testator, having several children; devised to his two sons, W. W. and R. W., a tract of land, to them and their heirs forever. In a subsequent

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clause, after many previous devises, he devises as follows: "I will that if any of my children die without issue, leaving a wife or husband, it is my will such wife or husband shall be entitled to one-half of the property, the other half to be equally divided between my other children or their heirs." Held, that the contingent limitations over were good, and therefore that W. W. and R. W. could *not convey an absolute and unconditional estate in fee simple free from these limitations*. This case is very similar to the one under consideration, and, among other things, sustains us wherein we say that neither Joseph W. Russ, Mary E. Russ or Margaret B. Russ could convey the devises to them until the contingency happened, to-wit: the death of one of them; that their estate was entangled for one life.

The case of Threadgill and others, vs. Ingraim, 1 Iredell, 577, is another case in point. The restricting clause of the will reads as follows: "And if either of my children die without heirs lawfully begotten, then his or her part to be equally divided between my surviving children and their heirs forever." Held the limitations over in the will was not too remote.

Zillicoffer vs. Zillicoffer, Devereaux & Battle's Law Reports, vol. 4, page 438, was decided in 1839. In the will before the court in that case, a testator devised a certain tract of land to his eldest son, and the balance of his lands to his widow, all his sons and his daughters, and in a subsequent clause directed as follows: "At the death of my said wife, all the land and negroes that may fall to her shall return to J. Z. (one of his sons,) and in case of the death of either of my aforementioned children without a lawful heir, begotten of his or her body, that then his or her part shall be equally divided among the *survivors*." It was held, that, upon the death of J. Z. without children subsequent to the death of the widow, all the lands which he had acquired under his father's will—both that part which was given to

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him immediately and that which was limited to him after the death of his mother—went over to his surviving brothers and sisters, and *that the limitation was not too remote*. Ruffin, Chief Justice, in delivering the opinion of the court, says: “We do not, indeed, recollect that any will has been before the court in which real estate was given over to a ‘*survivor*’ upon the death of the first taker without issue or heir of the body. But although there may have been no direct determination as to the effect of that phrase, we have a principle established, by adjudication upon cogent reasoning, which covers this case and sustains the limitation.”

The case of Jones vs. Speight, 1 Car. Law Rep., 544, is approved, in which it was held that a devise over of LAND upon the death of the first taker “*without having issue*” was good. “It was so held,” says Chief Justice Ruffin, “because the reason for taking those words in an artificial and technical sense in regard to land did not exist here, since the abolition of entails, more than in regard to chattels. Therefore, in a devise of *land*, we must receive them in their *natural sense*, as they had before been received, in both countries, in personal bequests.”

The case of Brantly et al. vs. Whitaker, 5 Iredell’s Law, 225, being cited by counsel for complainant, we will comment upon it when we take up that side of the question. It is sufficient to state here, that it fully sustains the rules laid down by the court in determining this to an executory devise.

In South Carolina the leading case, Keating and wife vs. Reynolds, 1 Bay, 79, was as follows: A having two daughters, B and C, devises to each of them and to their *heirs of their body* forever certain personal chattels, *but* if they, the said B and C, should *die without having a lawful heir of their body to live*, then he devised the said chattels to be “equally divided to the survivors.” B marries and has issue now alive; C likewise marries and has a child born alive,

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but which dies a few days after its birth, and after its death C, the mother died, without leaving any issue *alive at the time of her death*. The court held that the limitation over to B was not a limitation *over after an indefinite failure of issue*, and therefore good.

As we think this case strongly resembles the Russ will under consideration, we may be pardoned for extracting some of the opinion of the court. The court say: "The will gives the negroes in question to Martha Thorpe, but upon the contingency of her leaving no *children*, (for the words 'heirs of the body to live' mean *children*, if they mean anything,) then to the *survivor*. This term 'survivor' is a term of much import here. It carries with it the idea of the longest liver, provided the other sister should leave no children behind her—that is, none living at the time of her death; for, if she had left a child, that child, or those claiming under it, must have taken. But, as there was none living, then she who should survive was the person to take. This, then, is not a limitation depending upon a remote, but a very limited, contingency—one which was to happen in a very short period during the life of a person then living, and cannot be called a limitation after an *indefinite failure of issue* to a person not then *in esse*, and the limitation over upon the contingency of her leaving no children, to the survivor, is a sufficient description of the person he meant should take, so as to bring this case within the rules of law in support of the limitation."

In Jones vs. Price, 3 Dess., 165, it was held, that where the intention of the testator appears to be plain that the devise over should take effect after dying without issue of the first devisee, the court will give effect to such intention and not readily construe the limitation too remote.

In Clifton vs. Exrs. of Haig, 4 Dess., 330, a testator devised the residue of his real and personal estate to his daughter and the issue of her body lawfully begotten forever; but, in case

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of the death or failure of issue of his son and daughter, then and in either of these cases, he devised and bequeathed the same to his nephews, S. W. and T. B., to be equally divided between them. Held, the limitations over are not too remote.

In the case of Balder vs. Harden, 6 Richardson's Equity Reports, 147, the court held as above.

In Alabama, Pennsylvania and Georgia the same law is laid down.

In Mississippi (see 12 Smedes & Marshall, 231, Rucker et al. vs. Lambdin et al.,) the words of the will were: "I wish the property which I bequeath and bestow on Sarah A. Treely to be given and secured to herself and her bodily heirs, should she marry, and at her death, should she have no issue, it is to go to her brothers and sisters." Held, that this was not an estate tail, but an executory devise.

The adjudications in New York arising upon devises of this kind were examined by the Supreme Court of the United States in Jackson vs. Chew, 12 Wheaton, 153, and found settled by a uniform series of adjudications that the limitation over was good as an executory devise. It is true Chancellor Kent differed from the majority of the court in Anderson vs. Jackson, 16 Johnson, 297, and made a reference to Fosdick vs. Cornell, 1 Johnson, 440, and Jackson vs. Blandshaw, 3 Johnson, 289, which he says he decided or were decided on mistaken grounds, yet he did not succeed in convincing the court that they were thus decided. On the contrary, they decided that the provisions of the will, which were, "It is my will that if either of my said sons should depart this life *without lawful issue*, his share or part shall go to the *survivor*," was a good limitation over in fee by way of executory devise to the survivor on failure of issue living at the death of either of the sons. And, in the case of Lion vs. Burtiss, 20 Johnson, 483, decided four years after the case of Anderson vs. Jackson, the court held

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the same thing, notwithstanding the recantation of Chancellor Kent. The opinion of the court in this last case was delivered by Spencer, C. J., and was unanimous—in which Mr. Spencer says: “*I must be allowed to say that subsequent reflection has confirmed my conviction of the soundness of the decision of the Court of Errors.*”

We will pass over the early cases in New York in which Lord Kenyon is said by Chancellor Kent to have been the blind guide that misled them, and rely upon the case of *Moffit vs. Stong*, 10 Johnson, 16. This case was not repudiated by Chancellor Kent, but one in which he says he considered *fully* and decided “after great deliberation.” The words of the will were: “*If any of the sons should die without lawful issue, then his part to go to the survivors,*” Says Kent, C. J., in delivering the opinion of the court: “The intent of the testator, according to the settled legal construction of terms, appears then in this case to have been to provide for the surviving sons on the contingency of either of the sons dying leaving no issue at his death, and as this intention is consistent with the rules of law, the limitation over is good by way of executory devise.” The rest of the court concurred in the opinion.

In Connecticut, see *Morgan vs. Morgan*, 5 Day’s Reports, page 517, by will in that case, A devised his real estate to his sons, B, C, D and E. their heirs and assigns forever, and added a clause to his will, that in case either of his sons should “die without children, his brothers should have his part in equal proportion.” Held, that the limitation over was good by way of executory devise. Held, also, that by the words “die without children” is intended *a dying without children living at the death of the first devisee*.

There were nine Judges who sat in the Supreme Court of Errors on the adjudication of this case, and were unanimous in their decisions. Edmund, J., in delivering the opinion of the Court, says: “The time when the contingency con-

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templated was to take effect, if ever, was on the death of one of the four brothers, and not an indefinite period. This is apparent from the words of the disposition itself. 'And also my will is that if my sons should either of them die without children, *that his brothers shall have his part in equal proportion.*' Who, then, is to take on the happening of the contingency, that is, on dying without children? The words of the clause give the answer, 'his brothers shall have his part in equal portions'—brothers then in being, confining the operation of this disposition to the time of the death of one son, living the others, in direct opposition to the idea of waiting the event of an indefinite failure of issue."

In *Hard vs. Thompson*, administrator, in 3 B. Munroe's Kentucky Reports, page 487, the will was a devise to all the testator's children to be equally divided; "*but should either die without heirs of their body, lawfully begotten, that their part so allotted and given to them as aforesaid to be equally divided amongst my other children then living.*"

The court say: "According to the strictest rule of English interpretation, we cannot regard the devise in question as a limitation over after an indefinite failure of issue, which would constitute it an estate tail, but as a limitation over upon a fee, which vests the estate in the surviving children, upon the death of either without ISSUE LIVING at his or her death, and is good as an executory devise." On the part of the complainant it is contended the testator *intended* a limitation over after an indefinite failure of issue, and therefore an estate tail; that there are no expressions or circumstances in the will, which, in giving them their legal import, would show the testator looked to the death of any one of them as the definite period at which the contingency should happen.

We have examined the numerous authorities cited by the able counsel for complainant and well considered the argument urged in applying them to this case and the conclu-

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sions urged, and while there are contradictory opinions which we shall not attempt to reconcile, they all agree that if there is anything in the will to authorize the change of the rule of legal construction of words, that then the court should do so, to carry out the intention of the testator. As a condensed brief, with the authorities of counsel for complainant, will be published with the report of this case, we will only mention a few leading ones.

The case of Brantly vs. Whitaker, 5 Iredell, 225, was as follows: A, by will, devised land to his two daughters, H. B. and S. B. to them and their heirs, "and if they should die without an heir, *then* to his wife, B. One daughter died without issue. Held, that the limitation over was too remote.

But the court say: "If the limitation over had vested on the event that the two daughters died without children, it would have been a good limitation, as that event must necessarily have been known during the life or lives of persons in being or twenty-one years thereafter. But the word *heir*, used by the testator, cannot be construed *children*, as there is nothing *in the will* to authorize us to change its technical signification." It will be observed that the court intended that if there was anything in the will which would authorize the *change of its technical signification*, it would be done. In the case at bar we think there are expressions and circumstances in the will which authorize us to change the technical signification of the words "heirs of the body" to children, and fix the period of failure of issue to the time of the death. Whether or not the will authorizes such a change is the turning point in this case, as it is in all others where conflicting opinions have been given—*each case* depending upon the peculiar expressions and entire provisions of the will—and so long as the intention of the testator is thus arrived at, there will be apparent conflicting opinions.

In the case of Allen and Wife vs. White, Administrator

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of Rufus Mills, 16, Alabama, 181, the peculiar expression in that will was, "*be kept for the maintainance of my son, his family and lawful children, which he now has or may hereafter have and the survivor of them.*"

The wife of the son claimed the slaves as survivor. The court lays down the rule of executory devise as we have and goes on to say: "Now, if the words '*survivor of them*' create a limitation good as an executory devise, the property may be tied up and rendered inalienable for more than fifty years after the death of all the parties in life who took an interest under the bequest, and in the event that Rufus had left two or more children living at his death it might have been more than fifty years before the absolute title would have vested in the one who survived all. The limitation, therefore, is too remote, as this estate was entangled for more than one life, and of course it is not within the rule of an executory devise."

In the case of Williamson vs. Daniel, 15 Wheaton, 568, says Chief Justice Marshall, in delivering the opinion of the court, "*There are no words in the will which restrain the dying without issue to the time of the death of the legatee.*" The remainder over is to take effect whenever either of the immediate legatees should die without a lawful heir of his or her body." Did the Russ will, which we are construing, rest entirely upon the 8th clause, there would be no doubt of the entailment; but, the 14th clause being annexed, we think there are *superadded* words which bring it within the rule of executory devise and entangles the estate only for the life of one in being.

The case of Bells vs. Gillespie, 5 Randolph, 275, is contradictory to the view we take of the word "survivor." In that case there was a divided Court, Judge Coalter thinking the words "surviving brothers," in that case, meant *at the time of his death*, and therefore the precise time for failure of issue was fixed, while Judges Cabell, Carr and

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Green thought, by the use of those words, he looked to an indefinite failure of issue in the first taker and too remote.

Snyder vs. Snyder, 2 Munford, 263, is a case relied upon by counsel for complainant. It will be seen, upon examination of that case, that the question of *intention of the testator* was not touched upon at all, but the case was decided upon the strict technical rules. The words were not construed within any rule created for the purpose of supporting the *intention* of the testator, and so it will be found on examining most of the cases conflicting with the decisions in New York.

It is conceded that the construction of this will is a mere question of intention.

Lord Macclesfield declared that this technical rule of construing a dying without issue to import a definite failure of issue was created for the purpose of supporting the intention of the testator.—4 Kent, 285.

We have here, then, a precedent for construing “survivor” as used in this clause of the will to import a definite failure of issue restricting the 8th clause for the purpose of supporting the intention of the testator.

To return to the will of Russ. We have already seen it contains the essential quality to support an executory devise, if the expressions definitely limit the time when the contingency should happen, to-wit: at the death of either of the children of testator. The question, then, is, are there expressions and circumstances of the will from which it can be collected that the words “without heirs of the body,” and “heirs of the body,” are used by the testator in a more confined sense.

First. It is evidenced by the will, that the legatees were to take in their character of *survivors*.

Secondly. The words of the 14th clause, taken as a whole, confine the contingency on which the limitation rests to heirs then in being. The contingency was to take effect (if

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ever) at the death of one of the legatees. If they had to wait for an indefinite failure of heirs, what was the use of providing for a division of the estate? Again, as a brother or sister, they might inherit under an indefinite failure of issue. If the testator intended that, why make provision for that which might, in due course of law, happen?

Thirdly. The testator, in the 11th article of the will, makes provision for the *complainant*, she being the daughter of the deceased son. By this he substituted her for the deceased son, and makes provision that if she dies without children, then her property is to go to Joseph W., Mary E. and Margaret B. Russ, and secures it from her husband, if she has any, but makes no provision for what she might receive as heir of either Jos. W., Mary E. or Margaret B., which he would have done had he contemplated she might by any contingency inherit any portion of the property given either of them. His grand-daughter was then in *esse*. He had reason to suppose she would survive her uncle and aunts. Were they or either of them to die, if he intended her to inherit, he would naturally have made provisions for it in the eleventh item of the will. If he had intended to put his grand-daughter as "survivor" on equal footing as the representative of her father with his other children, he would have included her by name in the 14th item of the will.

In *Crugar vs. exr's of Hayward*, 2 Dess., 114, the court says: "All cases on the construction of wills depend on the particular penning of the wills themselves and the state of families to which they relate."

It is urged, that in some of the items of this will, where the bequest and devise is to Jos. W. Russ, Mary E. or Margaret B., it is to them their heirs and assigns, and it is asked, what becomes of the idea that this will contains an executory devise? The answer is that the *latter* clause will prevail.—*Finly vs. King*, 3 Peters, 366.

It is contended, on the authority of *Barlow vs. Salter*, 17

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Vesey, Jr., 479, that the word "survivor" should be understood as meaning only *others*. It has undoubtedly been so construed, but it will be seen that courts have construed it to fix the period of failure of issue. The construction of this, like other words, is governed by the expressions or circumstances contained in the will. It is insisted, that as the testator, by the use of the words "heirs of her body," in the 8th item of the will, created an estate tail in the first taker, that therefore we cannot superadd the words in the 14th item to show that he did not mean those words in the legal sense. If this is so, what becomes of that fundamental rule in the construction of wills, to-wit: *that the intent of the testator must govern the construction?* It is by adding the last clause that we ascertain whether the testator meant the words "heirs of the body" in their legal sense, or whether he has used improper words, which he intended to use in another sense, i. e. *children*. We think the testator evidently meant to say "her children." The words "heirs of the body" have been construed children.—3 Atk., 781; 1 Ba. & Ald., 713; 1 Bay, 85; 2 P. Wms., 342; 1 P. Wms., 229, 230; 20 Johnson, 483.

It is contended, that the case of Watts, adm'r, vs. Clardy, 2 Florida, 369, settles the question in dispute in this cause. We do not intend any conflict with that case. That was a *deed* in which the word survivor is inserted, and the rule of construction of a deed is much more strict; besides, there are no such expressions or circumstances in the context of the deed or will in that case, and superadded words relating to the grantee, as there are in this case to the legatee. We are therefore satisfied that, according to the settled legal construction of the terms, evinced by weight of authorities, the testator (Russ) intended in this will to provide for his surviving children on the contingency of either of them dying and leaving no issue at the death of the one so dying, and as this inten-

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tion is consistent with the rules of law, the limitation over is good by way of executory devise.

It is therefore ordered, adjudged and decreed, that the decree of the Chancellor in the court below overruling said demurrer be *reversed*, and said bill be dismissed. But, under the circumstances of this case, the bill being for a construction of a bill in which both parties were interested, it is further ordered, adjudged and decreed that the costs, including those in the court below as well as in this court, be paid by the administrator of the estate of Margaret B. Russ, deceased, out of the assets of said estate.

NATHAN LINDSAY AND WIFE, APPELLANTS, vs. JOHN PLATT,
ADMINISTRATOR OF JOSHUA PLATT, DECEASED.

1. An advancement to a husband by his father-in-law is an advancement to the wife.
2. An agreement between the father-in-law and the husband that the former would never enforce the payment of a debt due to him from the latter, but that the same should be considered an advancement to the wife; said agreement having been complied with by the father-in-law during his life, makes the amount of said debt an advancement, which ought to be brought into hotch-pot.

This case was decided at Tampa.

Appeal from Hernando Circuit Court.

For a statement of the facts of the case, reference is made to the decision of the Court.

Gettis & Mitchell for appellant.

J. M. Taylor and *O. B. Hart* for appellee.

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WALKER, J., delivered the opinion of the Court.

This suit was brought for an account and distribution of the real and personal estate of Joshua Platt, deceased, who died in 1854, leaving eight children, of whom the *feme* complainant is one.

The only defence set up is that contained in the eighth section of the answer, which reads as follows:

“And this defendant, further answering, says, the complainant, Nathan Lindsay, on the 8th day of January, 1845, then the husband of the said Amy Lindsay, undertook to collect, and for that purpose received from said Platt, deceased, a promissory note in writing, signed by Thomas S. Farr, for five hundred and forty-eight dollars and eighty-one cents; that he, the said Lindsay, about one year thereafter, as the defendant has been informed and believes, and charges to be fact, did collect the same, with interest, by suit. The said Nathan and Amy, his wife, were then citizens of the State of Georgia; that at the time he so received said note, the said Nathan gave the said Joshua Platt, in his lifetime, his due bill for fifty-two dollars, and the said Lindsay, after he had collected said amount of said note and given his due bill as aforesaid, undertook and agreed, and faithfully promised the said Joshua Platt, in his lifetime, to wit, in the year of 1846, that if the said Joshua Platt would not sue him and make him pay the said amount of said note so collected as aforesaid and the said due bill, he, the said Nathan Lindsay, would deem the consolidated amounts as an advancement, to be accounted for upon the death of said Joshua Platt, out of the share of his estate that in equity and in law would be coming to Amy Lindsay, his wife, and the legitimate daughter of the said Joshua Platt, deceased; and the said Amy Lindsay was not present when the said Nathan Lindsay made said proposals to her father; but when she did hear of the contract she did not in any man-

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ner or form express her dissent thereto. Latterly she may have done so, but if so it has not been communicated to this defendant. And the said Joshua Platt agreed to and accepted the proposition of the said Nathan Lindsay, and fulfilled his portion of said contract to the letter; said contract was not reduced to writing; the amount of the note and due bill, when consolidated, with interest thereon, at the date of this agreement, was six hundred and thirty-seven dollars and twenty cents; and this defendant, being administrator on the estate of Joshua Platt, believes and claims and charges it as a fact that said amount ought to be brought into hotch-pot for the benefit of the co-heirs of the estate."

To this answer the complainant excepted.

First. On the ground that neither said amended eighth section nor any other part of defendant's answer alleges that the said promise or agreement entered into as aforesaid was done and entered into in the presence and hearing of Amy Lindsay, or that she entered with Nathan Lindsay, her husband, into said agreement with the said Joshua, and thereby became one of the contracting parties thereto, or that she at any time after the making of said agreement consented thereto, or that the same was given to her as advancement of her legacy or portion of her father's estate, nor is it alleged that the said Amy had any knowledge that the said Nathan, her husband, and the said Joshua, her father, had ever entered into an agreement such as that alleged by the defendant in the eighth amended section of his answer.

Second. The statute of limitation.

Third. That said contract not being in writing is void under the statute of frauds.

The following is also a part of the record, viz:

It is hereby confessed by the counsel for the complainants that it shall be adjudged by the court that the amount, six hundred and twenty-seven dollars and twenty cents, set forth in the eighth section of defendant's answer, which was

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advanced by Joshua Platt to the said Nathan Lindsay, *as in said section alleged*, shall be returned in hotch-pot with the estate of the said Joshua Platt, deceased, for distribution, before the complainants can recover on their bill, then and in that case there would be no amount whatever coming to the complainants.

(Signed,)

GETTES & MITCHELL,

Attorneys for Complainants.

Upon this record the parties submitted the cause, after argument, to the Judge of the Southern Judicial Circuit, and the court being advised of its decree to be rendered therein, “ordered, adjudged and decreed that said bill be dismissed, and that each party pay his costs of suit.”

Complainants then appealed to this court.

The only question presented by the record for our consideration is, whether the defence set up in the 8th section of the answer is a good one, or, in other words, whether the facts set up in that section of the answer amounts in law to an advancement.

After an examination of the authorities cited by the able counsel on both sides of this case, and such others as we have been able to find, we have arrived at the conclusion that the question of advancement must depend, generally, if not invariably, on the *intention* of the intestate. The Supreme Court of Kentucky, in the case of Barbour et al vs. Taylor’s heirs, reported in 9th Dana, 86, say: “They (the authorities) virtually recognize as a controlling principle the intestate’s intention, and therefore virtually decide that whatever he intended as an advancement, and would have been so treated at his death, should generally, if not invariably, be so considered, without regard to the mode of making or of securing the actual enjoyment of it, concerning all of which he should be the sole arbiter; and therefore there could be no doubt that if a father should vest in

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stranger the title to property in trust for a daughter, the estate thus intended for her by such provision should generally be deemed an advancement, even though by the misconduct of the trustee she had lost the whole benefit of the provision.

“A gift of money or other personal property to the husband of the donor’s daughter would, if not otherwise intended, be an advancement to such daughter, though the husband, by investing or losing it, might prevent his wife from deriving any benefit from it.”

There can be no doubt that the intestate intended this as an advancement. He made an express *contract* that it should be so considered. His having made a contract about it seems to have led the learned counsel on both sides into the error of treating the question of advancement as one depending in some degree upon the law of contracts. Such is not the case, and therefore neither the statute of limitations nor the statute of frauds has anything to do with this question. Nor is it material that the daughter did not or might not have known of the arrangement between her husband and father, (it does not appear certainly whether she did or did not know it,) since it certainly appears that her father intended it as an advancement to her, and neither her knowledge or consent was necessary to make it a good advancement. The property in the life-time of her father belonged to him, and it was for him to determine whether he would ever give her anything or not, either by advancement or will. His action in the disposition of his property did not depend in any measure upon her knowledge or assent. Nor does our “married woman’s act” of 1845 enter into the consideration of this question further than this, that the husband, the instant his father-in-law entered into this arrangement with him, became indebted to his wife in the amount of the sum agreed upon as an advancement. Even if the money had been taken from the pocket of the father and

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handed immediately to the daughter, the husband would have been entitled to the immediate possession of it and the wife could not have sued him for even so much as the interest of it. (See Tho. Dig., 221.) It mattered not, therefore, whether the money intended as an advancement was left in the hands of the husband or the wife.

In conclusion, we will cite the case of *Bridgers and Wife vs. Hutchins, Administrator, &c.*, which seems to us directly in point. The report says, (see 11 Iredell, 68,) "The suit is for an account and distribution of the estate of Isaac Hutchins, who died intestate in 1844, leaving four children, of whom the *feme* plaintiff is one."

"Bridges stated before the Master that some years before 1842, but after his marriage, he borrowed from the intestate the sum of \$250 and \$200, and at the several times of borrowing gave his notes therefor to the intestate, and that in 1842 the intestate gave him up the two notes to be cancelled, saying at the same time that his reason for doing so was that he, the intestate, did not want them to come against the examinant after his, the intestate's, death, and that he was then old and did not expect to live long."

"The plaintiff objected to so much of the report as found those sums of \$200 and \$250 to be advancements, and upon argument the exception was overruled and the petition dismissed with costs, and the plaintiffs appealed.

RUFFIN, C. J.: "The decree must be affirmed with costs. A gift to the husband during coverture is undoubtedly an advancement to the wife, and it is quite clear that the release or cancelling of the bonds of the child, with the intention thereby to prefer him in life, is as much an advancement as so much cash," citing *Gilbert vs. Wetherell*, 2 *Simons and Stuart*, 254.

Let the following order be entered: Ordered, That the decree of the Chancellor rendered in this cause, whereby the bill was ordred to be dismissed, be affirmed with costs.

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It is further ordered that a transcript of this judgment be made by the Clerk of this Court, and the same being duly authenticated under his seal of office, be transmitted to the Deputy Clerk of the Supreme Court at Tampa, to be entered upon the minutes of the court at that place and to stand as a judgment of the regular March Term, 1860, of that court. *Per curiam.*

WINDER H. HARRISON, PLAINTIFF IN ERROR, VS. THE STATE.

An indictment under the act in relation to trading with slaves, approved January 24, 1851, which charges the defendant with buying and receiving grain from a slave, "*whose name is to the jurors unknown*," but avers the name of the owner of the slave and charges the offence to have been committed on a *day certain*; held sufficient, without giving the name of the slave.

This case was decided at Marianna.

Writ of error to Jackson Circuit Court.

The opinion of the Court contains a statement of the facts of the case, to which reference is made.

Anderson & Milton for plaintiff in error.

W. D. Barnes, for Attorney General, for the State.

FORWARD, J., delivered the opinion of the Court.

The defendant was indicted in the Circuit Court, holden in and for the county of Jackson, for buying grain from a negro without a permit, under the statute of 1851. (See Pamphlet Laws of 1850, page 133.)

This indictment contains two counts. In one count it is charged that the defendant "*unlawfully did then and there*

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buy from a slave whose name is to the jurors unknown, (the property of Olympia Sullivan,) to wit: a half bushel of corn, of the value of fifty cents, without a permit from the person having control of said slave authorizing said slave to dispose of said corn."

It is alleged in the second count that the defendant "*unlawfully did then receive grain, to wit: a half bushel of corn, of the value of fifty cents, from a slave whose name is to the jurors unknown, the property of Olympia Sullivan, without a permit,*" &c.

On the trial of the cause, the defendant was convicted, and a fine of one hundred dollars imposed upon him by the court.

A motion was made in arrest of judgment upon the following grounds, viz: Because the indictment sets forth that the defendant did then and there unlawfully buy from a slave whose name is to the jurors unknown, (the property of Olympia Sullivan,) grain, &c., and was therefore too vague and uncertain; which motion was overruled and judgment entered.

The error assigned is that the court erred in overruling the motion in arrest of judgment.

The question is as to the sufficiency of the indictment. It is urged by the counsel for the defendant that the indictment is defective for uncertainty, in not averring the name of the slave, or some other description of the slave which would point the defendant to the particular slave with whom he traded without permit, so that he might produce or prove the permit, or show that the slave was another and different one.

There is force in this objection to the indictment. As a general rule almost certainty is required in indictments, so that a former conviction or acquittal may be pleaded to other indictments, and the defendant may be enabled to determine

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whether the facts alleged constitute an indictable offence, and the defendant enabled to prepare his defence.

In this case the slave is described as the property of Olympia Sullivan. Had the name been given it would have been but an additional description. The only other mode of description would be by describing the features of the slave.

Is it not a sufficient description if the name of the owner is set forth? Could not a former conviction or acquittal be plead? And was not the defendant enabled to prepare for his defence?

The counsel for the defendant cite the cases of Francois vs. The State, 20 Alabama, page 84, and Starr vs. The State, 25 Alabama, page 39.

These cases are strongly in point, and favor the position of counsel. But if closely examined it will be observed that in the case of Francois vs. The State, the *name of the owner was not alleged in the indictment*. Of course an averment of trading with a slave whose "name is to the jurors unknown," without stating or setting forth the name of the owner, would be uncertain, and the defendant might, with some propriety, say he is not in possession of facts sufficient to enable him to prepare his defence.

The case of Starr vs. The State is directly in analogy with the one we are considering. The indictment in that case charged the defendant (Starr) with trading "*with a slave, the property of Beanajah Bibb, whose name is to the jury unknown.*" The court held the description as fatally defective. In the opinion of the court, however, it is stated, "*that there may be cases in which the requisite certainty may be attained without naming the slave, we admit.*"

There is a marked difference, as will be seen in the Alabama case, from their practice there, in the averment of *time*, and the practice in this State.

In Alabama the manner of laying the time in the indictment is simply by stating "*before the finding of this indict-*

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ment.” Under such an indictment as that, the defendant may be embarrassed in pleading a former acquittal or conviction and in his preparation for defence. But in this State the practice is, under indictments of this kind, to aver the time with certainty, and in the indictment under consideration the trading is charged to have been made “*on the 6th day of May, in the year of our Lord eighteen hundred and fifty-nine.*”

Thus the indictment, it will be seen, in this case, describes the slave by stating him to be the slave of Olympia Sullivan, and the offence to have been committed on the 6th day of May, 1859.

In Mississippi, (see Noonan vs. The State, 1 S. & M., 574,) it was holden that if the name of the slave to whom property was sold is unknown, it is sufficient so to aver in the indictment.

In Virginia, (see Commonwealth vs. Smith & Burwell, 1 Grattan, 553,) the court held that in an indictment for selling ardent spirits to slaves, it is not necessary to state the name of the owners of the slave to whom the liquor was sold. The indictment averred that the owners’ name was to the jurors unknown.

In House vs. Commonwealth, 8 Grattan, 755, the defendant was indicted for aiding the slave of G. & D. to escape from his owner, without *naming* the slave. Held sufficient.

In North Carolina, (see State vs. Robbin, 9 Iredell, 356,) the court say; “In an indictment for trading with a slave, if the name of the slave be set forth, it is not necessary to state the name of the owner.”

In South Carolina the same averments are considered sufficient. See State vs. Scurry, 3 Rich. (Law,) 68.

It is a well settled principle at common law that where a third person cannot be described by name, it is enough to charge him as a “certain person or persons to the jurors

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aforesaid unknown.” 1 Chitty’s Cr. Law, 212; 2 Hawkins 25, § 71; 2 Hale, 181.

We are of the opinion that in this case, as it is averred in the indictment that the slave was the property of Olympia Sullivan, and the day upon which the offence is committed is stated with certainty, there was sufficient description of the slave in the indictment without giving the name of the slave, and that in such cases, if the name of the slave is unknown, it is sufficient so to aver it.

The judgment of the court below is affirmed with cost.

JOSEPH MITCHELL AND JEREMIAH SAVILL, APPELLANTS, vs.
EZEKIEL WATSON, APPELLEE.

A judgment against a garnishee in a suit commenced by attachment is annulled by the dissolution of the attachment even after plea pleaded.

This case was decided at Marianna.

Appeal from Santa Rosa Circuit Court.

The opinion of the Court contains a statement of the facts of the case.

Jordan and Chain, Young, McClellan and Barnes for appellants.

G. G. McWharton and J. M. Landrum for appellee.

WALKER, J., delivered the opinion of the court.

The record shows, that on May 8th, 1857, appellee sued appellants in the Circuit Court of Santa Rosa county on a joint and several promissory note, of which the following is a copy, to wit:

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MILTON, July 14, 1856.

“On the first day of September next, we or either of us, promise to pay to E. Watson five hundred dollars, for value received, with eight per cent. interest from date.

“(Signed,)

JOSEPH MITCHELL,
JEREMIAH SAVILL.”

At spring term, 1857, defendants pleaded, first, the general issue; second, that on 13th April, 1857, before the commencement of this suit, said Mitchell had been served with a writ of garnishment, at the instance of Savill, in a suit by attachment which Savill then had pending against Watson, and that at June term, 1857, Mitchell answered that he was indebted to Watson in the amount of this note, (except eight or ten dollars,) and that this note was then in possession of John P. Lee, agent of Watson, who was also garnisheed in said attachment suit, and that the court on said answer of said Mitchell gave judgment against him in favor of said Savill.

To the second plea the plaintiff demurred, and the demurrer was overruled.

The plaintiff then replied to the second plea, that “after the service of said writ of garnishment upon the said Joseph Mitchell, the attachment on which said writ of garnishment was issued and founded was dissolved, as appears by the record, on 9th June, 1859.”

To this replication the defendant demurred, but the court overruled the demurrer and held the replication good.

By consent a jury was waived and the case was submitted to the court.

On June 10th, 1859, the court gave judgment for plaintiff for \$611 08.

Defendant then appealed to this court.

The question presented by the record is, whether a judg-

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ment against a garnishee in attachment is annulled by a dissolution of the attachment after plea pleaded?

Our statute (see Thompson's Digest, page 375,) provides, "that when judgment shall be rendered in such cases (attachment cases) against any garnishee or garnishees on his or her confession, or after trial by jury, as hereinbefore provided, such judgment shall not be enforced until after judgment shall be rendered against the defendant or defendants in *the attachment suit*; and in no case shall execution be issued against any garnishee or garnishees for more than the amount of the judgment against said defendant or defendants *in said attachment suit*. And if the plaintiff *shall discontinue his suit by attachment*, or be non-suited, or have a verdict against him on the trial in said suit, then said judgment against said garnishee shall become null and void," &c.

We are of opinion that the dissolution of the plaintiff's attachment is equivalent to his being non-suited in his attachment suit. It is true, that, if his attachment is dissolved after plea pleaded, he may "still proceed in said suit and prosecute his demand to final judgment, (Thomp. Dig., 375,) but he is enabled so to proceed, not by virtue of his attachment, but by reason of the fact that the defendant has appeared in court and pleaded to the declaration. The suit is no longer an attachment suit, but stands upon the same footing as an ordinary suit commenced by *præcipe* and summons. The judgment against the garnishee, growing out of the attachment and being a mere incident of it, must necessarily fall with the attachment on which it is based. After it has been adjudged that a party has wrongfully and illegally sued out his attachment, it would be inconsistent to say that he shall nevertheless hold on to all the fruits he may have attempted to secure by such wrongful and illegal act.

Counsel for appellee asks for damages under the 13th section of the act of February 10th, 1832, but, as the point in

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this case has never before, as we are aware, been adjudicated, and, as it does not appear that this appeal was taken merely for delay, damages are refused.

Let the judgment of the court below be affirmed with costs. *Per curiam.*

L. —

CATO, A SLAVE, PLAINTIFF IN ERROR, VS. THE STATE.

1. It is not indispensable that the jury, in a capital case, should be committed to the charge of a bailiff specially sworn for the occasion. It is sufficient if they be put in charge of the sheriff, or his deputy, who has taken the oath of office.
2. The "bill of exceptions" is a privilege accorded to a party to cause that to be made a *matter of record* which would not otherwise appear in the history of the trial; he must therefore incorporate in his bill whatever *fact* he may desire to rely upon as a matter of error. Unless so incorporated, the Supreme Court will not assume its existence, nor will it be induced to enter the field of mere conjecture.
3. If the court assumes to charge the jury, it ought to charge on the whole law, but if a party desires to avail himself of any failure or omission in this respect, he must call the particular point to the attention of the court, otherwise he will not be permitted to assign the omission for error.
4. Where a slave is indicted for the crime of rape, he cannot be convicted of a simple *assault*, the Circuit Court having no jurisdiction of that offence when committed by a *negro or mulatto*. Whether such conviction can be had in the case of a white man—*quaere?*
5. On a trial for the crime of rape, it is not sufficient to charge the jury that "if a man have carnal knowledge of a woman *against her will*, he may be convicted." The charge should be "*forcibly and against her will.*"
6. Although in a strict *legal* point of view, force may be implied from a want of *consent*, yet in common parlance such identity does not exist, and juries ought to receive their instructions on the law in language that they can understand.

This case was decided at Marianna.

Appeal from Jackson Circuit Court.

The plaintiff in error was indicted for the offence of rape,

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alleged to have been committed upon Susan Leonard, was tried at the October term, 1859, convicted and sentenced to be hanged on the 16th day of December, 1859.

At the trial, Susan Leonard was introduced as a witness on behalf of the prosecution, who testified as follows:

Cato came to my house on Friday morning, about one hour and a half before day; I was confined so I could not help myself; I looked up and he had one hand on each of my arms; I told him to go and he ordered me to hush; I said, who is this, and he said it is one of Dr. Ely's black men; by this time I waked up so that I knew him; the moon was shining very bright; I told him to go away; he said, "hush, hush, I tell you, or I'll kill you;" then he bore down on my shoulder and reached with his hand and got his knife and put his hand on my forehead and bore my head back against the pillow, and drew the knife across my throat, and I was compelled to give up; was afraid if I spoke or made any noise he would kill me; he then went through with what he came to do; he had a connexion with me then; I am certain that prisoner was the man; there was no one in my house to assist me; lady in the adjoining room; this is the reason witness did not hallo out; Mrs. Alsobrook lived in next room, only a partition between; saw Cato's eye by moonshine; room a small bed-room; room next to the road was mine; window five or six feet from the bed; never saw Cato at that house before.

Sarah A. Alsobrook, also sworn for the prosecution, testified that she knows the negro named Cato; identified the prisoner; knows Susan Leonard; I know that some person went there, but cannot say who; he was in the house and on the bed; looked like a negro; saw through the crack; heard Mrs. Leonard say, Lord-a-mercy, is this you Cato? he heard me coming and jumped off the window; about one and a half hours before day; on Friday night before day; this year; last summer past; before last court; a light moon-

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shiny night; lived in a house over the bridge; Mrs. Leonard said she was almost willing to swear it was Cato; I have seen Mrs. Leonard and Cato speak when he was about the house; I believe, to my certain knowledge, it was a negro; his head looked mighty kinky; he said it was one of Mr. Ely's negroes; he said it was Bill who lived at the hotel; he said something about coffee or flour; she told him there was a white man there and she would call him; he told her to hush or he would kill her; heard no scuffling; was close to the parties; she did not cry out; if she had I should have heard her.

For the defence there were twelve witnesses, who testified that both the witnesses for the prosecution were common prostitutes.

There being no other evidence, the court below charged the jury as follows:

"Cato, a slave, has been solemnly arraigned at the bar of this court upon the charge of committing a rape upon the body of Susan Leonard. He plead to the indictment in which his offence is alleged against him that he is not guilty, and you have been sworn and empanelled as a jury of the country to determine the question of his guilt or innocence. It is a solemn duty which now devolves upon you. It is a grave and important task which now demands your labors. You now hold in your hands, under God and the laws of the country, the issue of life and death, and you will not fail seriously to contemplate the grave and momentous consequences which will result from the verdict which you shall render in this case. Upon the one hand, if the laws of the land have been violated by the perpetration of a crime of a horrible and revolting character, and it has been proven to your satisfaction, by the evidence submitted, that the prisoner at the bar is the guilty person, then the commonwealth demands his conviction. But, upon the other hand, if it is not proven to your satisfaction that he is guilty, then the

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law and justice both concur in the demand for his acquittal. It is true that the prisoner is of the African race and a slave, but, so far as this trial is concerned, he has the same rights as a white man. All the rules of law which would apply to a white man, if put upon his trial for the crime of rape, must apply in this case. The laws of this State affix the death penalty to the crime of rape, whether it be committed by a freeman or a slave, and the evidence which has been placed before you has been brought to the test of the same legal principles and submitted to you under the same rules of evidence as would be invoked and applied if a white man were upon his trial.

“As the crime with which the prisoner is charged is that of rape, it is appropriate and necessary that I should instruct you as to what is in law material and essential to constitute the offence. Rape is where a man has carnal knowledge of a woman by force and against her will. It will be seen from this, that although a man may have unlawful carnal knowledge of a woman, if it be with the consent of the woman, it will not constitute the crime of rape. If, however, a woman yields through fear of death, or some great bodily harm or distress, it will be rape. And even if the woman at first consented, if the offence was afterward committed against her will, it would be rape; and if the offence were committed against her will, although she consented after the fact, it would be rape. And if a man have carnal knowledge of a woman against her will, although she be a common strumpet or a common prostitute, it will be rape, just as much as if the offence had been committed upon the purest and most virtuous woman in the world.

“Now, gentlemen of the jury, if you are satisfied from the evidence that the prisoner did have carnal knowledge of Susan Leonard against her will, and that he had sexual intercourse with her and accomplished his purpose against her will, then you must find him guilty. If you are satisfied

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from the evidence in this case that Susan Leonard yielded to the sexual intercourse and to the carnal knowledge through fear of death from the threats of the prisoner, then you must find him guilty. If you are satisfied from the evidence that the prisoner had carnal knowledge of her against her will by overpowering force, then you must find him guilty. Even if you are satisfied that Susan Leonard was a common prostitute, still, if you believe from the evidence that the prisoner did have carnal knowledge of her against her will then you must find him guilty.

"In prosecutions of this character it is allowed the defendant to prove that the prosecutrix is a common strumpet a common prostitute. This is a fact which is permitted to go to the jury for what it is worth, to indicate the improbability of a woman of such character withholding her consent to the carnal knowledge of a man. To this extent it goes to her credibility; but it is for the jury, after all, to look at the testimony to see whether the statements of the prosecutrix are true, either in whole or in part. If, upon a fair and impartial survey of all the evidence, you are satisfied that she has stated the truth, you are at liberty to believe her. You are to weigh the testimony carefully, and the law constitutes you the exclusive judges of the facts of the case, it is your province and your duty to determine, not only to the effect which should be given to the whole evidence but also as to the credit to which any and all the witnesses are entitled. If, after this careful consideration of the testimony and the witnesses which have testified, you still come to the conclusion that the prisoner did have carnal knowledge of Susan Leonard, and against her will, then you must find him guilty. You must, in order to a conviction, be satisfied from the evidence that the carnal knowledge was had by a man of the woman Susan Leonard, against her will; and you must also be satisfied from the evidence that the prisoner was the man who committed the

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If the evidence in this case fall short of fixing upon your minds the moral conviction, beyond a reasonable doubt, of the existence of the two facts, that the crime was committed and that Cato was the man who committed it, then you must acquit him. But, if these two facts are clearly made out to your satisfaction by the evidence in the case, then it would be your duty to find him guilty. You cannot be too deeply or too profoundly impressed with the deep solemnity of the duty which you have to perform. In the discharge of this duty you will be calm, dispassionate, impartial and just. You will so discharge this duty, in such a manner, as shall afford protection to innocence and visit guilt with punishment. You will give the prisoner the same fair and impartial trial that you would award to a freeman.

“I now commit this case to you, gentlemen of the jury, with the confident belief that you will discharge your duty fully, fairly, impartially and with firmness and fearlessness. You are to take the case into the jury-room, where all the world is to be shut out, and in your retirement you are to ignore all extraneous circumstances, facts and influences, and you are to determine from the evidence itself, and from nothing else; whether the prisoner is guilty or innocent, after which you will return into court and make the fact known by your sworn and solemn verdict. If, after a full view of all the testimony and a fair and patient consideration of the same, you have upon your minds a reasonable doubt of the guilt of the prisoner, such a doubt must enure to his acquittal.

“I now dismiss you to your room, gentlemen of the jury, with the sincere hope that you may be guided to a correct and just conclusion as to the question of the prisoner’s guilt or innocence.”

The jury retired under the charge of the Sheriff, James Griffin, and his Deputy, Henry O. Bassett, who were never sworn to take charge of said jury, but the one James Griffin

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had been sworn in as Sheriff and Henry O. Bassett a Deputy Sheriff of said James Griffin, and after consid of their verdict, returned into court and rendered a v of "*guilty*."

On the 22d day of October the prisoner was led t bar, and his attorney moved the court for a new tri the following grounds:

First. That the court erred in charging that if i been proved to your satisfaction by the evidence subn that the prisoner at the bar is the guilty person, the commonwealth demands his conviction; but on the hand, if it is not proven to your satisfaction that he is g then the law and justice concur in the demand for b quittal.

Second. In charging that if a man have carnal l edge of a woman against her will, although she be a mon strumpet or a common prostitute, it will be rap as much as if the offence had been committed up purest and most virtuous woman in the world. Now tlemen of the jury, if you are satisfied from the e that the prisoner did have carnal knowledge of Susan ard against her will, and that he had sexual inte with her and accomplished his purpose against her wi you must find him guilty.

Third. In charging, that even if you are satisf Susan Leonard was a common prostitute, still, if you from the evidence that the prisoner did have carna edge of her against her will, then you must find hi

Fourth. In charging, that if, after the careful c tion of the testimony and the witnesses which have you shall come to the conclusion that the prisoner carnal knowledge of Susan Leonard, and against then you must find him guilty.

Fifth. That the court erred in not charging the

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an indictment for rape, that they might find the prisoner guilty of an assault.

Sixth. That the special venire under which the jury were summoned was issued and executed illegally in this, that the Clerk issued a special venire for fifty good and lawful men without naming them or drawing their names from a box, and the Sheriff thereupon summoned fifty men, writing their names upon a blank sheet of paper, which is returned to the Clerk and the names so furnished by the Sheriff were then entered by the Clerk in the blank of the venire, and the Sheriff then endorsed on the back of the venire, that he has summoned the within named persons as jurors, such being the usual practice in this Circuit.

Seventh. That the jury who found the verdict against the prisoner were not under the charge of a sworn Bailiff but under the charge of the Sheriff and his Deputy, who had not been sworn as Bailiffs, but had been sworn as Sheriff and as Deputy.

Eighth. That the court erred in this, that Susan Leonard, the State's witness and prosecutrix, testified on cross-examination that men visited her house, but that they had no connection with her. Prisoner's counsel introduced Benjamin Stephens, and asked him if he had not had connection with Susan Leonard both before and since the prisoner was charged with rape upon her. This question the court ruled out and refused to permit said Stephens to testify in regard to the matter of his connection with her. Prisoner's counsel asked Susan Leonard, the State's witness and prosecutrix, if she had not had connection with Benjamin Stephens. This question the court overruled.

Ninth. That the verdict of the jury was against law and evidence.

The court overruled the motion for a new trial, to all of which rulings the defendant, by his counsel, excepted.

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Milton and McClellan for plaintiff in error.

W. D. Barnes for Attorney General for the State.

DUPONT, C. J., delivered the opinion of the court.

Cato, a slave was indicted in the Circuit Court of Jackson county upon the charge of having committed a rape upon the body of Susan Leonard. At the October term, 1859, he was arraigned, tried, convicted and sentenced to be hanged on the 16th day of December thereafter. Previous, however, to the passing of sentence by the Court, the prisoner's counsel moved for a new trial upon the following grounds, viz:

"1st. That the court erred in charging that if it has been proven to your satisfaction, by the evidence submitted, that the prisoner at the bar is the guilty person, then the Commonwealth demands his conviction; but on the other hand, if it is not proven to your satisfaction that he is guilty, then the law and justice both concur in the demand for his acquittal.

"2d. In charging that if a man have carnal knowledge of a woman against her will, although she be a common strumpet or a common prostitute, it will be rape just as much as if the offence had been committed upon the purest and most virtuous woman in the world. Now gentlemen of the jury, if you are satisfied from the evidence that the prisoner did have carnal knowledge of Susan Leonard against her will, and that he had sexual intercourse with her and accomplished his purpose against her will, then you must find him guilty.

"3d. In charging that even if you are satisfied that Leonard was a common prostitute, still, if you from the evidence that the prisoner did have carnal edge of her against her will, then you must find him guilty. Susan believe knowl- guilty. of the

"4th. In charging that, after careful consideration

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testimony and the witnesses which have testified, you should come to the conclusion that the prisoner did have carnal knowledge of Susan Leonard, and against her will, then you must find him guilty.

“5th. That the Court erred in not charging the jury in an indictment for rape, that they might find the prisoner guilty of an assault.

“6th. The special venire under which the jury were summoned was issued and executed illegally in this, that the Clerk issued a special venire for fifty good and lawful men, without naming them or drawing their names from a box, and the Sheriff thereupon summoned fifty men, writing their names upon a blank sheet of paper, which is returned to the Clerk, and the names so furnished by the Sheriff were then entered by the Clerk in the blank of the venire, and the Sheriff then endorsed on the back of the venire that he had summoned the within-named persons as jurors, such being the usual practice in the Circuit.

“7th. That the jury who found the verdict against the prisoner were not under the charge of a sworn bailiff, but under the charge of the Sheriff and his deputy, who had not been sworn as bailiff, but had been sworn as Sheriff and deputy.

“8th. That the court erred in this, that Susan Leonard, the State’s witness and prosecutrix, testified, on cross-examination, that men visited her house, but that they had no connection with her. Prisoner’s counsel introduced Benjamin Stephens, and asked him if he had not had connection with Susan Leonard, both before and after the prisoner was charged with rape upon her. This question the court ruled out, and refused to permit said Stephens to testify in regard to the matter of his connection with witness; counsel asked Susan Leonard, the State’s witness and prosecutrix, if she had not had connection with Benjamin Stephens. This question the court overruled.

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"9th. That the verdict of the jury was against law and evidence."

The court refused to grant the motion for a new trial, whereupon the prisoner took his writ of error under the statute, and he now comes before this court upon a transcript of the record of such proceedings as were had in the court below.

The general assignment of errors is as follows:

"The court erred in its instructions to the jury.

"2d. The court erred in *not* instructing the jury *fully* as that they might find the prisoner guilty of an assault.

"3d. There was error in the mode of summoning the special venire.

"4th. There was error in not committing the jury to the charge of a bailiff specially sworn to take charge of them.

"5th. The court erred in refusing to permit a question to be asked of Benjamin Stephens in relation to his having had illicit intercourse with the prosecutrix.

"6th. The verdict was against law and evidence."

In entering upon the investigation of this case, the court is not insensible to the magnitude of the interest involved in the result of its conclusion and the weight of responsibility that rests upon it in the discharge of the functions of a court of review and of last resort. Hence we have given to the case that patient hearing, that careful examination, that anxious and deliberate investigation which its importance demands.

On the one hand, the record presents the fact that a most foul offence has been perpetrated—that the majesty of the law has been insulted by the commission of a most heinous and revolting crime that strikes at the very foundation of society. On the other hand, life—the life of a human being—is suspended upon the issue. It is true that the unfortunate individual who stands charged with the commission of the offence is one of an inferior caste—a slave. But it is the

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crowning glory of our “peculiar institutions,” that whenever life is involved, the slave stands upon as safe ground as the master. The same tribunals of justice are open to each—the same form of proceedings—the same safeguards that are extended to the one are fully and freely awarded to the other. Influenced by and impressed with these views, we now address ourselves to the consideration of the case as it is presented in the record.

We will, for the present, pass by the *first and second* errors set forth in the general assignment, which relate exclusively to the matter of the *instructions* to the jury, and proceed to consider the *third* in the series of errors complained of. That assignment refers to the mode which was adopted by the Clerk and Sheriff in executing the order of the Judge, which directed the issuing of a *special venire*, in anticipation of the trial of the prisoner. This point was earnestly pressed at the hearing, and the counsel for the prisoner commented at large and with much force and particularly upon the manner in which the law had been violated; but upon a careful scrutiny of the record, the court is unable to discover a tittle of evidence to sustain the assignment or to support the allegations and arguments of the counsel. There is nothing said *in the history* of the proceedings which took place at the trial concerning the issuing of any order for a *special venire*, or even that there was any necessity to resort to one in order to obtain a competent jury for the trial of the prisoner. The only allusion made to the matter is to be found in one of the causes assigned in the court below as a ground for the granting of a new trial. It is very clear that its incorporation into the motion for a new trial, gives it no verity as a *fact* transpiring in the history of the trial. If the prisoner desired to avail himself of this alleged irregularity, he should have been careful to have taken such an action in relation to the matter as would have caused it to have been incorporated into the record as

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a fact. The assigning it as a ground for a new trial does not so incorporate it. The fact may or may not be as is alleged in the motion, and this court will not act upon mere presumption. The assignment is therefore dismissed, with the remark, that the same point is regularly made in the case of James O'Conner vs. The State, decided at this term of the court, to which case reference may be had for our ruling upon the point.

The fourth error assigned refers to the failure of the court to cause a bailiff to be specially sworn to attend and take charge of the jury while deliberating upon their verdict. It was insisted in argument that it was a fatal irregularity to allow the jury to retire under the charge of the Sheriff and his deputy, who had not been specially sworn for the occasion. The record sufficiently shows that such was a fact in the history of the trial, and the court is therefore called on to rule upon the point as presented in the assignment. This point also arises in the case of O'Conner vs. The State, and being fully discussed and ruled in that case, it becomes unnecessary to discuss it here. It is sufficient in this case to say that the error is held not to be well assigned, and it is therefore overruled.

The fifth error assigned is in reference to the refusal of the court to permit the witness, Benjamin Stephens, to be interrogated as to his having had an illicit intercourse with the prosecutrix. The design of the counsel for the prisoner in seeking to propound the question in the court below was to contradict a statement of the prosecutrix, who had testified on behalf of the State, and thus to impeach her as a witness. We do not feel called upon, or even at liberty to consider the assignment, for, as in the case of the *third* assignment, it is not supported by an iota of evidence. The only mention made of it in the record is when it occurs as one of the grounds stated in the motion for the new trial. We therefore dismiss it also, without further consideration.

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The “bill of exceptions” is a great privilege accorded to a party, to cause that to be made a matter of record which would not otherwise appear in the history of the trial; and it is for him, therefore, to be careful to have incorporated into his bill whatsoever *fact* he may desire to rely upon as matter of error. Unless so incorporated this Court will not assume its existence, nor will they be induced to enter the field of mere conjecture.

The sixth error assigned is, that the verdict is against the law and the evidence. We propose to consider this assignment in connection with the *first* and *second*, which were passed by, and which related exclusively to the instructions of the Judge as given to the jury.

We will consider first the complaint that the Court did not charge *fully* as to the law of the case. It is insisted, in this connection, that the court having undertaken to charge on the law, it was his duty to have charged fully on the whole law, and that it was error in the Judge not to have instructed the jury that they were at liberty to find the prisoner guilty (under the indictment for rape) of an assault. The position is undoubtedly correct that if the Court assumes to charge at all, it ought to charge on the whole law. But it is also well settled that if a party desires to avail himself of any failure or omission in this respect, he must call the matter to the attention of the court by a prayer for the instruction desired, otherwise he will not be permitted to assign it as error. In this case, the record does not show that any instruction of the kind was asked for. It is too much to expect of a judge, in the hurry and confusion of a *nisi prius* trial, that he should be able to retain in his mind every point of law that may properly bear upon the case, and hence the rule above indicated that no failure or omission to charge upon a particular point of law will be sustained as error, unless his attention be specially called to it. In considering this assignment, we are left somewhat in

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doubt whether the complaint is the failure to charge that the jury might find the prisoner guilty of an "assault with intent to commit a rape," or whether that they were at liberty to find him guilty of a simple "assault." If the former be the position intended to be assumed, then it is sufficient to say that the failure or omission so to charge can work no injury to the prisoner; for, by the statute (Thomp. Dig., 490 and 538,) *in the case of a negro*, the two offences are placed upon the same footing—they are both punishable by death. If, however, the latter be the position intended to be assumed, viz: that the jury might, under the indictment, have found the prisoner guilty of a simple assault, then there is presented for consideration a very grave question, which is not easily settled. All writers on criminal law seem to be agreed, that, as a general rule, if a party be indicted upon the charge of having committed a higher offence, he may be convicted, under the indictment for that offence, of any of the minor offences which are necessarily included in the perpetration of that higher one. Mr. Bishop, in his admirable Treatise on Criminal Law, (vol. 1, § 538,) enumerates the rule thus: "In that class of cases in which a series of offences are included, one within another, a party indicted for any one of them may be convicted of any lower one, unless, what does not often happen, the form of the allegation is such as does not properly charge the lower."

Now, it is very evident that in the crime of rape an assault is necessarily included, and, under the rule above indicated, it would seem that one indicted for the higher crime of rape might be convicted of a simple assault. But it is said that there is an exception to the rule, which limits the extent of its operation, as that there can be no conviction for a misdemeanor on an indictment for a felony, and such would seem to be the current opinion. The reason

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usually assigned for this limitation to the rule is, that, anciently, one charged with a misdemeanor had certain advantages at the trial, such as to make a full defence by counsel and to have a copy of the indictment and a special jury, which were privileges not allowed to those arraigned for felony, and it was deemed to be unjust to suffer a too heavy allegation to take from a defendant any of those privileges. As these distinctions are measurably abrogated in our country, the courts of some of the States, acting in obedience to the maxim *Cessat ratione legis, cessat ipsa lex*," have discarded the exception to the rule, and, as a consequence, have permitted convictions for misdemeanors on indictment for felony.—1 Bishop on Criminal Law; §544, and case cited. This rule seems to have been disregarded in some of the earlier English cases, and the distinction not to have been settled, as in the case of *Rex vs. Joyner*, 1 J. Kelly, 29; but in the more recent case of *Regine vs. Saunders*, 8 Car. & Payne, 265, reported in 34 E. C. L. Reports, 726, Gurney B., said: "I am bound to tell you that the evidence in this case does not establish the charge contained in this indictment, as the crime was not committed against the will of the prosecutrix, as she consented, believing it to be her husband; but if you think that that was the case, and that it was a fraud upon her, and that there was not consent as to this person, you must find the prisoner guilty of an assault. *Before the passing of a very recent statute*, I should have had to direct you to find a general verdict of acquittal, but by that statute it is enacted, that in any case of felony where the crime charged shall include an assault against a person, it shall be lawful for the jury to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding." The statute here referred to is that of 1 Vic., c. 85 § 11.

But, whatever might have been our conclusion on the point if the party indicted had been a white person, we are

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very clearly of the opinion that the particular instructions referred to in the assignment would have been highly improper, as the Circuit Court has no jurisdiction of assaults committed by a negro. The jurisdiction of assaults committed by negroes is given to Justices of the Peace by statute, and the Circuit Court would have no right to render judgment on any such verdict found by a jury. The section of a statute referred to is in these words, viz: "If any negro, mulatto, bond or free, shall at any time use abusive and provoking language to, *or lift his hand* in opposition to, any person not being a negro or mulatto, he, she or they so offending shall, for every such offence, proved by the oath of the party before a Justice of the Peace of the county or corporation where such offence shall be committed, receive not exceeding thirty-nine lashes on his or her bare back, except in those cases where it shall appear to such justice that such negro or mulatto was wantonly assailed and lifted his hand in his or her own defence." Thomp. Dig., 540, § 9.

Mr. Bishop fully supports us in this view of the matter. In his Treatise on Criminal Law (vol. 1, § 548) he says: "Want of jurisdiction in the tribunal may present an obstacle to a conviction, for the less offence on an indictment for the greater. Thus in Tennessee the Circuit Court can take cognizance for murder, but not of manslaughter committed by a slave, the latter offence being, in such a case, triable only in another court, and the consequence is that when a slave is charged in the Circuit Court with murder the verdict cannot be for manslaughter," citing *Nelson vs. The State*, 10 Humph., 518, and also *The People vs. Abbot*, 19 Wend., 192.

For these reasons we are of opinion that the Judge below very properly omitted to instruct the jury that they were at liberty to find the prisoner guilty of a simple assault, and therefore the *second* error assigned is also overruled.

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This brings us to consider, lastly, the evidence in the case and the instruction of the Court based thereon. In the argument before us some exceptions were taken by the counsel for the prisoner to the remarks of the Judge below, introductory to the delivery of his charge upon the law. We have carefully examined these introductory instructions and can perceive nothing in them that affords the prisoner any reason to complain. They were happily conceived and expressed, and were well calculated to impress the minds of the jury with the solemnity of the occasion and the vital importance of the issue submitted for their determination. We think, furthermore, that the circumstances of the case imperiously demanded the caution contained in these instructions. Here was an allegation that one of the highest crimes known to the law and one of the most revolting to the feelings and sentiments of society had been committed, and the evidence pointed directly to one as the perpetrator who was of a degraded caste, and who occupied a social position greatly inferior to the position occupied by those who were to pass upon his life or death.

In order to a full comprehension of the exceptions taken to the instructions upon the law, a brief condensation of the evidence given at the trial will here be necessary. Susan Leonard, the prosecutrix, testified as follows: "Cato came to my house on Friday morning, about one hour and a half before day; I was confined, so I could not help myself; I looked up and he had one hand on each of my arms; I told him to go, and he ordered me to hush; I said, who is this? and he said it is one of Dr. Ely's black men; by this time I waked up, so that I knew him; the moon was shining very bright; I told him to go away; he said, 'hush, hush, I tell you, or I will kill you;' then he bore down on my shoulder, and reached with his hand and got his knife,, and put his hand on my forehead and bore my head back on the pillow and drew the knife across my throat, and I was compelled

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to give up; was afraid if I spoke or made any noise he would kill me; he then went through with what he came to do; he had a connection with me then." . . . "I am certain that the prisoner was the man." . . . "There was no one in the house to assist me; lady in adjoining room; this is the reason witness did not halloo out." . . . "Mrs. Alsobrook lived in next room; only a partition between." . . . "Saw Cato's eye by moonshine; room a small bed-room; room next to road was mine; window five or six feet from the bed; never saw Cato at that house before."

Sarah A. Alsobrook testified as follows

"Knows a negro named Cato; identified the prisoner; knows Susan Leonard; I know that some one went there, but cannot say who; he was in the house and on the bed; looked like a negro; saw through the crack; heard Mrs. L. say, Lord-a-mercy, is this you Cato; he heard me coming and jumped off the window; about one and a half hours before day on Friday night before day; this year; last summer past; before court; a light moon-shiny night;" "lived in a house over the bridge; Mrs. Leonard said she was *almost willing to swear it was Cato*; I have seen Mrs. L. and Cato speak when he was about the house;" "I believe to my certain knowledge that it was a negro; his head looked mighty kinky; he said he was one of Mr. Ely's negroes; he said it was Bill, who lived at the hotel; he said something about coffee or flour; she told him there was a white man there and she would call him ;he told her to hush or he would kill her; heard *no scuffling; was close to the parties; she did not cry out*; if she had I could have heard her."

In addition to this testimony, there was abundant proof that both these witnesses were common prostitutes of the lowest grade. Upon this evidence and after the introductory remarks above referred to, his Honor, the Judge below proceeded to charge the jury as follows:

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“Rape is where a man has carnal knowledge of a woman by force and against her will. It will be seen by this, that, although a man may have unlawful carnal knowledge of a woman, if it be with the consent of the woman, it will not constitute the crime of rape. If, however, a woman yields through fear of death or some great bodily harm or duress, it will be rape.”

“And even if the woman at first consented, if the offence were afterwards committed against her will, it would be rape; and if the offence were committed against her will, although she consented after the fact it would be rape.

“And if a man have carnal knowledge of a woman against her will, although she be a common strumpet or a common prostitute, it will be rape just as much as if the offence had been committed upon the purest and most virtuous woman in the world.

Now, gentlemen of the jury, if you are satisfied from the evidence that the prisoner did have carnal knowledge of Susan Leonard against her will, and that he had sexual intercourse with her and accomplished his purpose against her will, then you must find him guilty. If you are satisfied from the evidence that Susan Leonard yielded to the sexual intercourse and to the carnal knowledge through fear of death from the threats of the prisoner, then you must find him guilty. If you are satisfied from the evidence that the prisoner had carnal knowledge of her against her will, by overpowering force, then you must find him guilty. Even if you are satisfied that Susan Leonard was a common prostitute, still if you believe from the evidence that the prisoner did have carnal knowledge of her against her will, then you must find him guilty.

“In the prosecutions of this character, it is allowed the prisoner to prove that the prosecutrix is a common strumpet or a common prostitute. This is a fact which is permitted to go to the jury for what it is worth, to indicate the improba-

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bility of a woman of such character withholding her consent to carnal knowledge of a man. To this extent it goes to her credibility, but it is for the jury, after all, to look to the testimony to see whether the statements of the prosecutrix are true, either in whole or in part. If, upon a fair and impartial survey of all the evidence, you are satisfied that she has stated the truth, you are at liberty to believe her. You are to weigh the testimony carefully, and the law constitutes you the exclusive judges of the facts of the case, and it is your province and your duty to determine, not only as to the effect which should be given to the whole evidence, but also as to the credit to which any and all of the witnesses are entitled. If, after this careful consideration of the testimony and the witnesses who have testified, you should come to the conclusion that the prisoner did have carnal knowledge of Susan Leonard, and against her will, then you must find him guilty. You must, in order to a conviction, be satisfied from the evidence that the carnal knowledge was had by a man of the woman Susan Leonard **against her will**; and you must also be satisfied from the evidence that the prisoner was the man who committed the crime.

“If the evidence in this case fall short of fixing upon your minds the moral conviction, beyond a reasonable doubt, of the existence of the two facts, that the crime was committed, and that Cato was the man who committed it, then you must acquit him. But, if these two facts are clearly made out to your satisfaction by the evidence in the case, then it would be your duty to find him guilty.

“You cannot be too deeply or too profoundly impressed with the deep solemnity of the duty which you have to perform. In the discharge of this duty you will be calm, dispassionate, impartial and just. You will so discharge this duty as shall afford protection to innocence and visit guilt with punishment. You will give the prisoner the same fair and impartial trial that you would award to a freeman.

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“I now commit the case to you, with the confident belief that you will discharge your duty fully, fairly, impartially and with firmness and fearlessness. You are to take the case into the jury room, where all the world is to be shut out, and in your retirement you are to ignore all extraneous circumstances, facts and influences, and you are to determine from the evidence itself, and from nothing else, whether the prisoner is guilty or innocent, after which you will return into court and make the fact known by your sworn and solemn verdict. If, after a full view of the testimony and a fair and patient consideration of the same, you have upon your minds a reasonable doubt of the guilt of the prisoner, such a doubt must enure to his acquittal.

“I now dismiss you to your room, with the sincere hope that you may be guided to a correct and just conclusion as to the question of the prisoner’s guilt or innocence.”

It is insisted by the counsel for the prisoner, that in the body of the instructions the question of *force* is totally ignored, and that the issue presented to the jury was made to rest exclusively on that of *consent*. In examining these instructions, we find that the idea of *force and violence*, as constituting an ingredient of the crime, occurs only in the *definition* given of the offence. In but one of the many special instructions which were given to the jury is this idea incorporated, and the learned Judge seems to have confounded the two ideas of *force* and *want of consent*, and to have considered them as identical and as one and the same. From the very terms used to define the offence, it is quite manifest that there must be a *concurrence* of the two ingredients in order to give to the crime its full proportion.

It is sometimes said that a want of consent always implies force or violence. This may be true, considered in strictly legal sense and when presented to a trained legal mind, but, in common parlance, (and juries can be addressed properly only in that language,) there is a very manifest difference.

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A woman may revolt at the very idea of yielding herself to the embraces of a man. Her moral sense may be shocked at the bare thought, and she be totally unwilling to commit the act, but impelled by the stress of circumstances growing out of her own necessities, she may be induced to take the fatal step in the total absence of any force or violence. This view of the matter is peculiarly applicable to the circumstances of this case. There is evidence of *solicitations* on the part of the alleged perpetrator, and of a parley between him and the prosecutrix. Mrs. Alsobrook testified that "he said he was one of Mr. Ely's negroes; he said it was Bill, who lived at the hotel, and he said *something about coffee and flour.*"

It is manifest from the evidence that at this particular point of time, *persuasion* and not *force* was being used by the person to overcome her will and to accomplish his purpose. And if we connect this evidence with the testimony of the prosecutrix, it will be seen that this effort at *persuasion* occurred subsequent to the *threat* testified to by her, for the purport of her evidence is that he made the threats to kill her *immediately* on her being aroused from sleep. Taking into consideration the degraded character of the witness, and that she was *contradicted* in several important particulars by the other witness on the part of the State, we think that it was a case which eminently demanded that the question of *force* and *violence* should have been kept directly before the minds of the jury, by occupying the most prominent place in the several instructions which were given to them by the court. Such not having been the case, we are constrained to hold the objection to the instructions good and to sustain the *first error assigned*.

Upon the question of *identity* of the prisoner as the real perpetrator of the alleged offence, the court are not satisfied that the evidence was sufficient to warrant the conviction of

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the prisoner. That matter rested on the sole testimony of the prosecutrix, and is entirely uncorroborated by any concurring circumstances. It is true that the prosecutrix swears positively to the identity of the prisoner, as being the perpetrator of the alleged crime, but in this, if not contradicted, her testimony is greatly shaken by what she is alleged to have said to the other witness, Mrs. Alsobrook. She testified that "Mrs. Leonard said she was *almost willing to swear* it was Cato." Now, it is very evident that at the date of her communication to Mrs. Alsobrook, she was in *doubt* as to the identity of the guilty person. By what means that doubt was afterwards removed, so as to enable her to swear *positively* to the fact on the trial, does not appear.

Lord Hale, in referring to the character of this offence has well said, "It is true that rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered that it is an accusation easily to be made and hard to be proved and harder to be defended by the party accused, though never so innocent." He then mentions two remarkable cases of malicious prosecution for this crime that had come within his own knowledge, and concludes: "I mention these instances that we may be the more cautious upon trials of offences of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance, the heinousness of the offence many times transporting the Judge and jury with so much indignation that they are over-hastily carried to the conviction of the person accused thereof by the confident testimony sometimes of malicious and false witnesses." *Vile 1 Russ. on Crimes*, 690-1.

Upon full consideration of the whole case and after the most anxious deliberation, we are of the opinion that the prisoner is justly entitled to a new trial.

It is therefore *Ordered* that the sentence of death passed

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upon the prisoner Cato, by the Circuit Court of Jackson county, on the 22d day of October, A. D. 1859, whereby he was adjudged to be executed on Friday, the 16th day of December then next ensuing, be vacated and annulled, and that the verdict of the jury rendered in the said case also vacated, annulled and set aside, and that the cause be remanded to the said court, with directions to award to the prisoner a new trial therein.

LAWRENCE N. AMOS, ADM'R OF ELIJAH GAYLOR, DECEASED,
APPELLANT VS. NEIL CAMPBELL, APPELLEE.

1. A *trust*, in its strict and technical sense, is known only in equity, and so long as it subsists it cannot be reached, as between trustee and *cestui que trust*, by the statute of limitations.
2. To exempt a trust from the bar of the statute, it must be, first, direct trust; second, it must be of a kind belonging exclusively to the jurisdiction of a Court of Equity, and, third, the question must arise between the trustee and the *cestui que trust*.
3. An *action at law* for a distributive share of an intestate's property cannot be maintained against the personal representative, although he may have expressly promised to pay.
4. Whether a final settlement in the Probate office and an *order to pay over* to the distributee will give the right to maintain such action—*Quaere?*
5. The settlement of an executor's or administrator's account in the Probate office does not change his character as *trustee*, and he will still hold any balance in his hands, for distribution, and not adversely.
6. There is no rule defining definitely what *lapse of time* will bar a purely *equitable* demand. Each case must depend upon its own circumstances.
7. The maxim, *vigilantibus non dormientibus jura subveniunt*, is founded upon considerations of public policy and enlarged views of right and justice, and is to be highly commended when properly applied.
8. There is no particular *form* necessary for the *notice* directed to be given in the statute of *non-claim*. It should however, be so full and ample in its terms as to make it a WARNING to those who have demands against the estate.

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9. Under the policy of the several statutes regulating the administration of estates, the rights of *creditors* and of *distributees* stand upon a different footing. While the statute of *non-claim* will operate as an absolute *bar* to the former, it will not prevent a recovery by the latter.

10. The object and design of the statute of *non-claim* is three-fold ; First, to facilitate the settlement of estates by prescribing a limit of time within which creditors and other persons having an interest should be compelled to exhibit their claims preparatory to a final distribution ; second, to protect the executor or administrator in all payments which he might make *bona fide* after the expiration of the two years ; third, to quiet the title of the legatees or distributees to the property received as such legatees or distributees.

11. Where there has been unreasonable delay on the part of a distributee to call administrator to account, he will be allowed, at farthest, only simple interest on his demands.

This case was decided at Marianna.

Appeal from Escambia Circuit Court.

A statement of the case will be found in the opinion of the court, to which reference is made.

Jordan, Yonge, McClellan & Barnes for appellant.

R. L. Campbell for appellee.

DUPONT, C. J., delivered the opinion of the court.

The appellee brought suit on the equity side of the Circuit Court of Escambia county against the appellant as administrator of the estate of Elijah Taylor, deceased. The bill filed in the cause sets out, that one Charles Campbell, being possessed of a considerable amount of personal property, departed this life in the year 1829, leaving the complainant as his only child and heir ; that after the decease of the said Charles Campbell, one Elijah Gaylor obtained letters of administration on his estate and entered upon the administration thereof ; that the said administrator, on the 13th day of April, 1836, presented to the Probate Court of Escambia county his account current as administrator of the estate, which account was then allowed by the Judge of the

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said court, and a balance of \$1,122.97½, found to be due by him to the estate of the said Charles Campbell.

The complainant further charges, that this balance has never been accounted for by the said administrator and that, as sole distributee of his father's estate, he is entitled to the said balance, after deducting the amount that his mother may have been entitled to as the widow's share.

The bill further states, that the said Elijah Gaylor departed this life in the year 1853, and that on the 28th day of March, 1854, administration of his estate was granted by the Judge of Probate of Santa Rosa county to the said appellant and asks that the said administrator of the said Gaylor may come to an account with the complainant for the said balance so remaining against him at the time of his death.

The answer of the defendant, admitting that the complainant is the only child of the intestate, Charles Campbell, alleges that his intestate, Elijah Gaylor, intermarried with the widow of the said Campbell on the 17th day of March, 1831, and thereby became entitled, under the statute, to one-half of the estate of the said Campbell. It further admits that Gaylor did obtain letters of administration on the estate of Campbell, and alleges that in September, 1831, he published in the Pensacola Gazette, for the space of eight weeks, a notice to the creditors, legatees and distributees of the estate to present their claims within the time prescribed by the statute; that after the payment of all the debts and expenses incident to the administration the said Gaylor made a final settlement of his accounts in the Probate Office and thereupon (as defendant believes) obtained a final discharge from the Office of Administrator. The answer further alleges that the said Gaylor, after retaining the portion of the estate to which he was entitled in right of his wife, paid over to complainant whatever amount was coming to him from the estate, and that in fact, upon a fair settlement between the complainant and the estate of the said Gaylor,

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it would be made to appear that the said complainant is largely indebted to the said estate for over advances made to him and on his account by the said Gaylor in his lifetime. The answer further sets up, by way of a plea in bar, that the complainant did not present to Gaylor, the administrator on his father's estate, any claim or demand as distributee or otherwise at any time within *three* years next after the publication of the notice aforesaid. It also sets up further, by way of plea, that the amount so claimed by the complainant was due (if at all) *five years and more* before the death of the said Gaylor. And further, by way of plea in bar, the answer sets up and insists upon it as a full defence of the bill, that "none nor either of the said supposed cause or causes of action mentioned by the said complainant in his said bill of complainant did arise or accrue to the said complainant within *five years* next before the death of the said Elijah Gaylor, deceased, nor within *five years* next before the commencement of this suit."

To this answer the complainant filed the general replication, and subsequently the following admissions in writing were filed with the papers of the cause, viz: "The complainant in the above stated cause admits that Elijah Gaylor married Nancy Campbell, who was the widow of Charles Campbell, deceased, and mother of complainant."

The following notice is also admitted to have been published in the Pensacola Gazette, viz:

"Letters of administration having been granted to the subscriber on the estate of Charles Campbell deceased, all persons having claims on said estate are requested to present the same for settlement within two years, and those indebted to the said estate are requested to make payment.

" Sept. 10—8w-17 ELIJAH GAYLOR, Adm'r."

The following admission in writing was also filed: "Admitted, that two months' notice of final settlement was given in 1835."

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The depositions of several witnesses are also incorporated into the record, but as these do not bear upon the question before us, it is unnecessary to notice them further. On the 3d day of January, 1859, the Chancellor made the following decree:

“This cause came on to be heard at the June term, A. D. 1858, of this court and was argued by counsel, and thereupon and upon consideration thereof it is ordered, adjudged and decreed as follows: That the said cause be and the same is hereby referred to Walker Anderson, Esq., who is hereby appointed special Master in Chancery, to take and state an account of the amount due to the estate of Charles Campbell, deceased, by the said Elijah Gaylor, in his lifetime, as administrator of the said estate of Charles Campbell, and to inquire and state to the court what parts, if any, of said estate of Charles Campbell are outstanding or undisposed of, and also take and state an account of the distributive share of the said complainant in the said estate of Charles Campbell. In stating said account the said Master shall allow the said complainant compound interest on his said distributive share from the time that the estate of the said Charles Campbell might have been distributed by the said Elijah Gaylor. And the said Master shall credit the estate of the said Elijah Gaylor for all disbursements rightfully made by him, on account of the estate of the said Charles Campbell for all payments made by the said Elijah Gaylor to the said complainant on account of his distributive share of the said estate of Charles Campbell, and also for commissions and such other compensation as the said Elijah Gaylor or the respondent, as his administrator, may be entitled to for managing and distributing said estate of Charles Campbell.”

From this decree the defendant appealed, and now brings the record before this court for our adjudication. The grounds upon which a reversal of the decree is asked for in

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this court are: First. That the demand is barred by the general statute of limitations of *five years*. Second. That the demand is barred by its *staleness*. Third. That it is barred by the statute of *non-claim* the same not having been presented to the administrator within the *two years* prescribed by the statute.

We will consider these several grounds in the order in which they are here presented.

And first, as to the statute of limitations. The plea in this case raises the question whether, in a suit in equity by a distributee, calling upon the administrator for an account and distribution of the estate he will be allowed to interpose the statute as a bar. The question how far and in what cases a Court of Equity will allow the plea has been much discussed, and the reported cases present no little confusion on the subject. It will be seen, however, upon a critical examination of the authorities, that this confusion exists not so much with regard to the principle to be acted upon as to the application of that principle to particular cases. "Trusts," (says Angell on Limitations, 188,) "in their strict and technical sense, are known only in equity, and falling as they do in such a sense in the particular and exclusive jurisdiction of a Court of Equity, the doctrine has been long established that so long as they subsist they cannot be reached, as between trustee and *cestui que trust*, by the statute of limitation. He further remarks, that "to exempt a trust from the bar of the statute, it must be first a direct trust; second it must be of the kind belonging exclusively to the jurisdiction of a Court of Equity, and, third, the question must arise between the trustee and the *cestui que trust*."

These principles are ably supported and sustained by the great case of Kane vs. Bloodgood (7 John. Ch. Reps. 90,) decided by Chancellor Kent, in which he enunciates his conclusion thus: "Those trusts which are mere creatures of a Court of Equity, and not within the cognizance of a court

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of law, are not within the statute of limitations.” It would certainly be esteemed a work of supererrogation, if not of presumption, to attempt at this day to discuss a principle which has received the impress of the greatest minds of the age, and has been moulded into symmetry by the plastic hands of the masters of the law. It remains for us only to apply the principle, guided by such lights as may be afforded us. In order to test the applicability of the principle to this case, we will enquire, first, whether the *trust* here insisted upon is direct and peculiar to a Court of Equity? Angell, in his work on Limitations, (168,) says “The most common mode of creating *direct* trusts, not cognizable at law, is by the appointment and qualification of executors and administrators. Executors who are precluded from taking beneficially, and administrators claiming merely as such, cannot, by a virtue of a lapse of time merely, set up a title to the general residue. Being simply and technically trustees, there is no principle of equity which, upon that single consideration, can admit of their holding to the exclusion of the parties beneficially entitled.”—Citing 1 John. Ch. R., 314; 3 John. Ch. R., 316.

It will be thus seen, that the trust growing out of the office of executor or administrator is not only *direct* but *peculiarly* within the province of equity jurisdiction. We will now proceed to show that it belongs *exclusively* to equity, and that no action can be maintained in a Court of law against an executor or administrator for the recovery of a legacy or a distributive share of the estate. The case of Deeks vs. Strutt, (5 Term Reports, 690,) was an action of assumpsit brought against the executor for the arrears of an annuity bequeathed to the wife of the plaintiff. The executor never made any express promise to pay, but the assets were sufficient to satisfy the plaintiff's demand. It was contended for the plaintiff, that when a man was under a legal

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or equitable obligation to pay, the law *implies* a promise, though none was ever made. The court of King's Bench decided that the action could not be maintained, and Lord Kenyon, in giving his judgment, made the following observations: "The supporting of the present action would be attended with the most pernicious consequences, and I believe that no action till lately (except one in the time of the commonwealth) for a legacy has been supported in a court of law."

Mr. Williams commenting upon this case, remarks: "It will be observed, that, in *Deeks vs. Strutt*, the executor had not *expressly* promised to pay, and this circumstance has led to doubts whether the decision of that case went further than to determine that an action for a legacy cannot be supported on an *implied* assent in law of the executor, and whether an action will not still lie upon an express promise by him in consideration of assets, or upon an express admission by him that he has money in his hands for the payment of the legacy. However, the Judgment of Lord Kenyon has been generally considered as an unqualified decision that an action at law cannot be maintained for a legacy. And in a late case, it was holden by the court of K. B. that an action at law for a distributive share of an intestate's property cannot be maintained against the personal representative, although he may have expressly promised to pay."—2 Will. on Ex'rs, 1,644, citing to last point *Jones vs. Tanner*, 7 B. & C., 542.

Chancellor Kent, in his opinion delivered in the case of *Kane vs. Blodgood*, before cited, remarks upon the case of *Decache vs. Savetier*, previously decided by him and reported in 3 John. Ch. R., 216, as follows: "I am now lead to apprehend, in consequence of a more thorough examination of the question, that I did not lay sufficient stress in that case upon the circumstance, that, BY THE STATUTE LAW OF THIS STATE, actions at law, of debt, detinue or account

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may be brought for legacies and distributive shares. In *England*, it is the proper and exclusive province of the Courts of Equity to enforce the payment of legacies and distributive shares, and, following the *English* cases, I concluded that the statute of limitations did not apply to such demands."

But, it is insisted for the appellant, that the settlement made by the administrator in the Probate office altered the relation between him and the next of kin, and divested him of his character of *trustee*, and that, from the date of that settlement, he stood only in the right of a *debtor* to the estate for the amount of the balance which was struck against him on that settlement. The argument predicated upon this hypothesis is, that, being only a debtor and divested of the trust, equity, acting in obedience to the law, will allow the operation of the statutory bar of limitation. For this position we have been cited to the case of *Ivey vs. Rogers*, 1 *Badger vs. Deveraux* Eq. Cases, 58, but we have been unable to get access to the authority. It will be seen, however, that directly the converse of that position has been held in Pennsylvania, and we think it the better doctrine. There it is held that "the settlement of an executor's account in the proper court *does not change his character as trustee*, and that he still holds the assets for the purposes of the will and not adversely to it."—*Thompson vs. McGarr*, 2 *Watts' R.*, 161, cited in *Angell on Lim.*, §176.

From these authorities we are constrained to decide, that the plea of the statute of limitations could not be allowed to bar a recovery in this cause. By reference, however, to the formula prescribed in the statute (*Thomp. Dig.*, 197,) for the bonds to be given by administrators, it will be seen that one of the CONDITIONS of the same is that the administrator shall "make or cause to be made a true and just account of his administration when required, and all the rest and residue of said goods, chattels, rights and credits

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which shall be found remaining upon the administrator's account, the same being first examined and allowed by the Probate Court of the county where the said administration is granted, and shall deliver and pay to such persons respectively as the said court, by their order and decree, pursuant to the true intent and meaning of this act, shall appoint and direct." Whether such an *order to pay over* as is contemplated in this condition of the bond would have the effect to covert the *balance* so due by the administrator into a simple *debt recoverable at law*, and consequently subject to the bar of the statute, we do not decide.

The second ground of defence is, that the demand of the bill is *stale*. This is a defence *peculiar* to Courts of Equity, and is founded upon the mere lapse of time, where the statute of limitation is not allowable, upon the principle heretofore stated. "In such cases," (says Judge Story, 2 Eq. Ju., §1,620,) "Courts of Equity act sometimes by analogy to the law, and sometimes act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches in prosecuting rights or long and unreasonable acquiescence in the assertion of adverse rights." The maxim, *vigilantibus non dormientibus jura subveniunt*, is founded upon considerations of public policy, and on enlarged views of right and justice, and is to be highly commended when properly applied. But, as is well remarked in the case of Trescot vs. Long, (2 Vesy, Jr., 620,) "Each case depends upon its circumstances and the discretion of the court."

In looking to the circumstances of this case we see no reason to *bar* the complainant from the prosecution of his demand on account of its staleness, but as he has slept over his rights for nearly fifteen years, and has thus been lacking in proper vigilance, we shall direct the decree to be modified so far as to allow *simple* and not compound interest upon the account directed to be taken by the Master. In-

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deed, considering that the administrator is now dead, and that the accounting party is his personal representative, we have been strongly inclined to the disallowance of any interest at all.

The third and last ground of defence is that the demand is barred by the statute of *non-claim*, as it is usually denominated. That statute is in the following words: "All debts and demands of whatsoever nature against the estate of any testator or intestate which shall not be exhibited within the said two years shall forever afterwards be barred: *Provided*, That the executor or administrator shall, by an advertisement, to be published once a week for the space of four weeks, in some newspaper published in this State, give notice to all creditors, legatees and persons entitled to distribution, that their claims and demands will be barred at the expiration of the period aforesaid, unless exhibited within the same"—with the usual *saving* to persons laboring under disabilities, of two years after these disabilities shall have been removed.

The record presents the fact that a *notice* was published by the administrator for the space of four weeks, a copy of which is inserted in the statement of the case herein contained.

It is insisted for the defendant that it was incumbent upon the complainant to show that he had made due presentation of his demand within the time prescribed by the statute, and that not having done so the statute was a bar to his recovery. On the other hand, it is contended, *first*, that the notice is defective in substance; and, *second*, that even if good in form and substance, it presents no bar, the provision of the statute not being designed to prevent a *distributee* from recovering of the administrator the portion of the estate to which he may be entitled. We will consider first the sufficiency of the notice.

In the case of Fillyau and Wifs vs. Laverty, (3 Flo. R.

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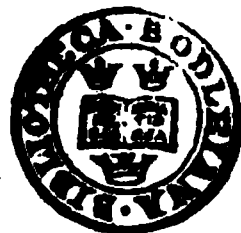
72,) the question as to the sufficiency of the notice came up for adjudication. That was a bill filed by a *creditor* against the distributee, to whom the executor had turned over the estate and had obtained a discharge. The defendants pleaded the statute of *non-claim* in bar of the recovery, and at the hearing relied upon the *notice* which had been published by the executor. That notice was in the following words: "All persons having any claims against the estate of William D. Harrison, deceased, are hereby *warned* to present them to the subscriber within the time prescribed by law, or they will be forever barred of recovery. All those indebted to the estate are requested to make immediate payment." In considering the sufficiency of this notice, the court (Hawkins, J., delivering the opinion) say: "It embodies, we think, substantially the requirements of the statute, and although it does not contain the words '*creditors, legatees and persons entitled to distribution*,' still we think the words, '*all persons having any claims against the estate*,' are of so comprehensive a character that they include and embrace within their meaning, creditors, legatees and persons entitled to distribution, upon the principle that the *major* includes the *minor*." "The notice before the court, from its substantial conformity to the requisitions of the section containing the statute of *non-claim*, must be taken by the court as a sufficient compliance with the provisions of the statute."

It will be seen by reference to the copy of the notice set forth in the statement of the case now under consideration that, both as to form and substance, it differs materially from the notice given in the case above cited. While the one is both mandatory and cautionary in its terms, the other is only precatory. In the case cited, the notice in terms *warns and cautions*; the notice in this case simply *requests* the presentation of claims. From the view which we have taken of the remaining question, it does not become neces-

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sary that we should rule definitely upon the sufficiency of the notice given in this case. We will, therefore, dismiss the point by a brief reference to what was said in the case of Ellison, Administrator, vs. Allen, (8 Fla. R., 206,) when the same question was incidentally alluded to. The court there said: "We will take occasion to remark that the notice should be ample and full in its terms, and should particularly state the limitation of *two years* as the period within which the claims are to be presented. In making this remark, we do not intend to be understood as coming in conflict with the case of Fillyau and Wife vs. Laverty, where this point, as to the sufficiency of the notice in this respect, was expressly ruled, but we only desire to call attention to its importance, that the operation of the statute may be such as that it may be made to subserve its legitimate end and object, viz: of furnishing full and ample notice to those who may have just claims or demands against the estate."

The next point for consideration, arising under this head, involves the interpretation of the statute as affecting the rights of the *distributee*. The case of Fillyau and Wife vs. Laverty, before referred to, has been cited by the counsel for the appellant as conclusive of this matter. But it will be noted as before stated, that in that case the bill was filed by a *creditor* of the estate to enforce the payment of his debt from a distributee who had received from the executor his distributable portion of the estate. The court decided, very properly we think, that the prescribed notice having been given by the executor, and the debt not having been presented to him within the two years, and being consequently barred as *against him*, it could not be enforced against the distributee. Indeed, we are at a loss to conceive how any other conclusion could have been arrived at. But that case presents a very different aspect from the one now under consideration. The complainant here is a distributee



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suing for an account from the administrator, and stands, we conceive, upon different grounds from a creditor.

It is said, however, that it is clearly intimated in the opinion delivered in the case of Fillyau and Wife vs. Laver-ty that the two classes occupy, under the statute, the same position as to their rights against the executor, and that suggestion is based upon the remark of the court, that the words "*all persons having any claims against the estate*" "are of so comprehensive a character that they include and embrace within their meaning 'creditors,' legatees and *persons entitled to distribution.*" It will be perceived, however, by reference to the context, that the court, in making that remark, was discussing the sufficiency of the notice relied upon in that case as a defence, and was not upon the rights of these several classes.

We think, therefore, that the position of the appellant derives no support from the decision made in that case. Other cases were also cited to the same point, but, being only rulings upon the *local* statute of the State in which they occurred, they afford but little light upon the subject, and can guide to no safe conclusion as to the meaning of our statute.

It is admitted that the words of the statute would seem to place creditors, legatees and distributees upon the same footing in reference to the bar of the two years, but it is well settled that words will never be permitted to control, much less contravene, the object, intent and design of the Legislature, where these can be gathered from other portions of their legislation with reference to the same subject. If the construction contended for by the counsel for the appellant be correct, what becomes of the provision of the act of 1834, prescribing the mode and terms upon which an executor or administrator may obtain a discharge from his office? That provision is as follows:

"If any executor or executrix, administrator or administratrix, shall be desirous of obtaining a *discharge* from his

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or her executorship or administratorship, it shall be competent for him or her to receive the same upon application to the Judge of Probate or other person charged with the duties of ordinary: *Provided*, That six months notice of such intended application be given in one or more of the gazettes nearest the place where the letters were granted: *And provided, also*, That it shall appear that the said applicant has faithfully and honestly discharged the trust and confidence reposed in him or her; and the discharge so obtained shall be taken to operate as a release from the duties of executor or executrix, administrator or administratrix, and shall furthermore operate as a bar to any suit against the person so having acted as executor or executrix, administrator or administratrix, unless the same be commenced within five years from the date of said discharge, saving," &c.—Thomp. Dig., 211, sec. 11, § 1.

Now if the bar of the *two years* contained in the *non-claim* act was designed and intended to reach to *all* demands that could be made against the executor or administrator, it is difficult to perceive the necessity for this provision which was enacted some six years subsequent to the date of that act. It is evident that at the period when this latter act was passed, the Legislature conceived that they could be called to account at any time, notwithstanding the existence of the *non-claim* act, and that this provision was made for their protection by enabling them to disconnect themselves from the *trust* and *confidence* attaching to their respective offices. The claim of the creditor, being strictly a *debt against the estate*, was fully provided for in the *non-claim* act; but the demand of the distributee, being rather against the *executor or administrator* holding as trustee than against the estate, it was deemed proper to afford them this statute of repose as a shield against the enforcement of *stale* demands from that quarter. We can give no other interpretation to the design of the Legislature in the passing of this act.

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But again, if the position assumed by the counsel for the appellant is correct, what becomes of the statute regulating escheats? By reference to the provisions of the act, it will be seen that where no person appears to take the estate, the proceeds thereof are directed to be paid into the State treasury for the benefit of the public. But if the statute of *non-claim* is to receive the construction contended for, then this act becomes wholly nugatory and of none effect; for under that construction, if no demand be made within the two years by one entitled to the distribution, the administrator will retain the estate to his own benefit. A construction which would lead to such a result is evidently incorrect. The object and design of the statute was, doubtless, three fold: first, to facilitate the settlement of estates by prescribing a limit of time within which creditors and other persons having any interests should be compelled to exhibit their several claims preparatory to a final distribution; second, to protect the executor or administrator in all payments which he might make *bona fide*, after the expiration of the two years, and, third, to *quiet the title* of the legatees and distributees to the property which they may have received as such legatees or distributees. This we conceive to have been the whole scope, intent, meaning and design of the Legislature in the enactment of this provision of the statute. It never could have been their intention to invest the executor or administrator with the title to the whole estate upon the failure or neglect of the legatees or distributees to present their claims within the prescribed limit of two years.

It will be thus seen that we sustain the right of the complainant to have an account from the representative of the administrator on the estate of Charles Campbell, deceased; but in the taking of the account the Master must be directed to allow simple interest only on the amount that may be found to be due the estate.

It is therefore ordered and adjudged that the decree of the

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Chancellor, rendered on the 3d day of January, A. D. 1859, whereby this cause was referred to the Master, with directions to take an account (except so much thereof as directs the mode of calculating interest on the same,) be affirmed; and as to so much of the decree as is above excepted that the same be *reversed* and set aside and the cause be remanded, with directions to the Chancellor to reform his decree by directing the allowance of *simple* interest only in making up the account to be taken by the Master.

It is further *ordered*, that the cost of this appeal be equally apportioned between the parties appellant and appellee.

HENRY HALL, PLAINTIFF IN ERROR, VS. THE STATE.

1. An assault with intent to kill is not an offence known to the common law, but by statute of this State is made a *misdemeanor*.
2. There is a difference between an assault with intent to kill and an assault with intent to murder. An assault with intent to kill may exist where the party intends only such killing as amounts to manslaughter.
3. Whether a person indicted for an assault with intent to kill, had such intent at the time of the alleged assault, is a question of fact for the jury to decide, and in deciding that question the jury ought to act upon those presumptions which are recognized by the law so far as they are applicable, and the intent, like malice, may be either expressed, or implied and presumed where facts authorizing the presumption are proven.
4. The charge of the court shall be confined to matters in issue. The court is not bound to instruct the jury, at the defendant's request, 'that if H. had killed W., and the homicide would have been manslaughter and not murder, that they ought not to find him guilty of the assault with intent to kill.'

This case was decided at Mariana.

Writ of error to Santa Rosa Circuit Court.

For a statement of the facts, reference is made to the opinion of the Court.

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C. W. Jones for plaintiff in error.

W. D. Barnes, for Attorney-General, for State.

FORWARD, J., delivered the opinion of the Court.

Henry Hall was indicted under the statute of February 10th, 1832, for an assault on Jesse Williams, with intent to kill him. The bill of exceptions states the following facts:

“The State introduced a witness, who, being sworn, testified that some time in January, A. D. 1859, one Jesse Williams was at his house in said county; that shortly after the arrival of said Williams there the defendant also came to his house; that shortly after these two parties had met, the defendant commenced a conversation with Williams, in the course of which the defendant accused two parties with stealing his money, but did not name them; that Williams became very angry with the prisoner, pulled off his coat and shook his fist at him, at the same time telling the prisoner that if he would go out of doors, he, Williams, could whip him; that the prisoner, after Williams had told him several times that he could whip him, finally observed to Williams that if nothing but a fight would satisfy him that he would accommodate him, and followed Williams out of doors; that shortly after the parties went out the witness heard a report from a pistol, and, on seeing Williams, discovered that he had been shot in the left arm, a little below the elbow, and that he, Hall, had fled.

A witness was then introduced on the part of the prisoner, who testified that he was present when the difficulty between Hall and Williams occurred; that Hall was at the house referred to by the other witness before Williams arrived; that Williams, on his first entering the house, began to threaten and abuse Hall and dared him to come out of doors with his coat off; that Hall, after some hesitation, went out, and that shortly afterwards the witness heard a

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pistol go off, and saw the prisoner run away; that Williams was shot in the arm but did not fall.

After argument, the prisoner's counsel asked the court to charge the jury, "that if Hall had killed Williams, and that the homicide would have been manslaughter and not murder, that they ought not to find him guilty of the assault with intent to kill;" which charge the court refused to give.

The Judge, on the contrary, charged the jury, "that it was not necessary that the shooting, if it had proved fatal, would have been murder in order to convict the prisoner of an assault with intent to kill, but that if from all the circumstances in evidence they were satisfied that if Williams had died from the pistol wound inflicted by Hall, although the killing would have been manslaughter, that they ought to find the prisoner guilty."

The defendant was found guilty, and his punishment assessed to three months imprisonment.

The errors assigned are, that the Judge erred in refusing to give the instructions asked by defendant's counsel, and in charging them as he did.

The statute under which this indictment is found is in the following words:

"Any person convicted of false imprisonment, mayhem, an assault and battery or an assault with intent to kill, shall be punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding six months, at the discretion of the jury; and any person convicted of a bare assault shall be punished by a fine not exceeding one hundred dollars, at the discretion of the jury.—Thomp. Dig., 490.

And the Legislature of the State have made the following general provisions for the trial and punishment of crimes, viz: That "the common law of England in relation to crimes and misdemeanors, except so far as the same relates to the modes and degrees of punishment, shall be and the

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same is hereby adopted and declared to be in full force in this State.

“All offences known to the common law, the punishment whereof is not provided for by this act shall be punished by a fine not exceeding five hundred dollars, or imprisonment not exceeding twelve months, at the discretion of the jury.” Thomp. Dig. 489.

Provision is also made by the statute for the punishment of murder, manslaughter and involuntary manslaughter, but no degrees of homicide are declared. All these were enacted at the same time and embraced in one act.

To determine whether the court erred in refusing to give the charge to the jury asked by prisoner's counsel and instead thereof giving to them the charge as appears by the record, it becomes important to enquire whether there is any difference known to the law between assault with intent to kill and assault with intent to murder—whether by intent to kill is meant an intent to murder, and whether an intent to kill may exist where the party making the assault intended only such killing as amounts to manslaughter? By referring to our legislation, it will be seen that in the same act under which this indictment is found the Legislature provided for the punishment of “*all offences known to the common law.*” By the common law, all *attempts to commit a felony* were offences. Thus, as manslaughter was a felony, an attempt to commit it was an offence known to the common law. Murder, being a felony, an attempt to commit it was an offence known to the common law. But by no statute of Florida is assault with intent to kill, assault with intent to murder, assault with intent to commit manslaughter or any attempt to commit felony, made a felony. On the contrary, they are misdemeanors.

At common law, an assault with intent to commit murder was not a felony, but was a great misdemeanor. So an as-

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sault with intent to commit manslaughter was a misdemeanor.

We have been unable to find that any such offence as an "assault with intent to kill" was known to the common law. The nearest we have come to it is by an expression in Blackstone heretofore quoted, while we do find the offence of assault with intent to murder defined, and precedents for the indictment; in which indictment it is averred that the person indicted committed the assault *feloniously, wilfully* and of his *malice aforethought*, with intent to kill and murder—the expression "to kill and murder" being made necessary to conform to the English statute. See *Rex. vs. Wood, Car. & Payne*, 381, note, vol. 19 Eng. Com. Law Reports.

It is contented by the counsel for defendant, with considerable force and supported by high authority, that this word "kill" in our statute is synonymous with "murder."

In Blackstone, 4 vol., page 196, the commentator, in speaking of the offence of murder, says.:

"Next, it happens where a person of such sound discretion *unlawfully killeth*. The unlawfulness arises from the killing without warrant or excuse, and there must also be an actual killing to constitute murder, for a bare *assault with intent to kill* is only a great misdemeanor, though formerly it was held to be murder."

Reference is made to 1 Hale's Pleas of the Crown, page 426. It is there asserted "that *an assault with intent to kill* was formerly held to be murder." By putting the remarks of these writers together, there is reason for the inference that "kill" and "murder" meant the same thing. This inference, however, is met by reference to Hawkins' Pleas of the Crown, page 114, sec. 21, where it will be seen that the declaring of such an assault to be murder arose from a misconstruction of the Statute of Marlebridge, c. 26.

In *Bradley vs. the State of Mississippi*, 10 Smedes &

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Marshall, page 619, Mr. Justice Hatcher, in delivering the opinion of the court says: "The indictment charges the accused with an assault and battery with a deadly weapon upon a certain slave *with intent to commit manslaughter*. This indictment can be construed only to be an indictment for an aggravated assault. It is not an indictment for an assault with intent to kill by which is understood as has been held, an intent to *murder*."

It is to be regretted that the court did not embody authorities in its opinion, and did not point the reader to the case or cases in which intent to kill is "*understood and has been held an intent to murder*." The contrary doctrine is held in at least five of the States of the Union and in England.—See *People vs. Shaw*, 1 Parker, 327; *State vs. Nichols*, 8 Conn., 496; *Nancy vs. State*, 6 Alabama, 483; *Moore vs. State*, 18 Ala., 532; *Ogletree vs. State*, 28 Ala., 693; 4 Missouri, 618; *Ohio Rep.*, 18, page 379; *Regina vs. Bourbon*, 2 Carrington and Kirwan, 367, found in 61 vol. English Common Law Reports.

In this last case, the first count of the indictment alleged an intent to murder, the second count an intent to disable, and the third an intent to do grievous bodily harm. Maule, J., (in summing up,) says: "If the prisoner had killed this man, it would have been murder whether he intended to kill him or not; but I think that there is hardly evidence here to support a charge of intent to murder. A person cannot have an intent to murder or an intent to do any other thing, without intending to commit murder or do that other thing. It would be a contradiction in terms if it were otherwise. You will therefore consider whether the prisoner had an intent to kill this man or only an attempt to disable him, or to do him some grievous bodily harm. If in this case death had ensued, there can be no doubt that the offence of the prisoner would have been murder; yet, I think it would

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be too much to say that the prisoner intended to commit murder.”

In the case of 4 Missouri, 618, the offence was described in the indictment as an assault with intent to kill. The court held that an assault with intent to commit manslaughter is indictable; it is sufficiently described in the indictment as an assault with intent to kill.

The case of Ogletree vs. The State, 28 Ala., 700, was an indictment with intent to murder. The offence by the statute of the State is made felony. The court says: “In consideration of the charge of the court, it is important to bear in mind the nature and ingredients of the alleged offence. The defendant is indicted, not merely for what he has effected, but for what he intended to effect—not only for his act, but for the *intent* with which he did the act.”

Mr. Bishop, in his Treatise on Criminal Law sec. 514, says: “The charge against him is, that in consequence of a *particular intent*, reaching *beyond the act done*, he has incurred a guilt beyond what is deducible from the act wrongfully performed.”

Again, in section 515 of Bishop’s Criminal Law, it is stated, that “on the other hand, where one is indicted for an assault with intent to murder, and the proof shows an assault with such *intent in fact*, it would seem that there may be a *conviction though the circumstances be such* that, if death had followed, the offence would not be in lawful murder.”

The cases of Shepherd vs. The State, 18 Ohio, 379, Nancy vs. the State, 6 Ala., 483, are cited as sustaining this. The weight of authorities clearly establishes that there is a difference between an intent to kill and an intent to murder. Thus we think an intent to kill may exist where the party intends only such killing as amounts to manslaughter. By reference to our acts of the Legislature set forth above, it

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will be seen that, by providing for the punishment of "*all offences known to the common law*," they had included all attempts to commit a felony, including assault with intent to murder, but being desirous that other intents to kill should be punished, they made assault with intent to kill, in cases where, if the party had carried out his intent, it would not have been murder, a misdemeanor, thus making an assault with intent to kill a statutory offence, and classed it with other assaults.

Whether he had that intent at the time of the alleged assault is a question of fact for the jury to decide, and in deciding that question "the jury ought to act upon those presumptions which are recognized by the law, so far as they are applicable, and their own judgment and experience as applied to all the circumstances in evidence. In ascertaining the intent, it may, like malice, be either express or implied and presumed where facts authorizing the presumption are proven.

It may be said that this construction of the act would make justifiable and excusable homicide, or any other killing, with or without malice, indictable, and therefore, in justifiable homicide, a party may be convicted for the *intent to kill* when he could not be convicted for the killing. The answer to that is, the justification or excuse will be a good defence on the trial.

Under the view of the law entertained by this court and herein expressed, it follows that we do not think the Judge in the court below erred in refusing the instructions asked by defendant's counsel, nor in the charge given by the Judge to the jury. We are aware of the fact that it has been the practice in this State to charge the jury on trials for an assault with intent to kill, that, to convict the prisoner of that offence, they must find, under the evidence, that the assault was committed with malice and under such circumstances that, had death ensued, such homicide would have

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been murder. It is probable the Solicitors and courts have been led into this error by following the law of evidence as laid down in Archibold's Criminal Pleadings, page 432, under "indictment to kill and murder." By reference to the form of the indictment therein given, it will be seen that it is alleged the offence was *feloniously, wilfully* and of *his malice aforethought* committed. Also as laid down in 1 Hawkins' Pleas of the Crown, page 225, under "an indictment for shooting at another." This offence is made felony under the statute of 9 Geo., 1 C., 22, known as the "Black Act." The expressions of the statute are, "that if any person shall wilfully and maliciously shoot," &c. Here the allegations in the indictment, and the express words of the act, constitute *malice* the essential part of the offence. Thus it was necessary to prove the assault committed under such circumstances that if death had ensued such homicide would have been murder. But, it will be seen, by reference to a note found in Hawkins' Pleas of the Crown, page 225, that it was held by the court in England that a shooting in the intemperance of passion, upon such a provocation as would in law reduce the crime of homicide to manslaughter, in which no malice can exist,, was not within the meaning of the act.

Per curiam.—The judgment of the court below is affirmed and this cause remanded back to the Circuit court holden in and for the county of Santa Rosa, and that Court directed to cause to be inflicted the punishment assessed by the jury.

Guild vs. Goldsmith, Haber & Co.—Opinion of Court.

JOSIAH Q. GUILD, PLAINTIFF IN ERROR, VS. GOLDSMITH,
HABER & Co., DEFENDANTS IN ERROR.

1. Where a promissory note, payable to order, was endorsed after it was due, it was held that the endorsee was bound notwithstanding to prove a demand of payment from the maker and notice to the endorser, *unless* there was some special agreement taking the endorsement out of the usual effect thereof, or circumstances occurred making demand and notice of dishonor unnecessary.
2. What is "a reasonable time" for demand for *payment* and notice of dishonor on a note transferred after it is due, (where the facts are ascertained,) is a question of law, depending on the facts of each particular case.

This case was decided at Marianna.

Writ of error to Santa Rosa Circuit Court.

The opinion of the Court contains a statement of the case, to which reference is made.

Jordan & Chain and *McClellan & Barnes* for plaintiff in error, cited: Byles on Bills of Exchange, 232 and note; Bishop vs. Dexter, 2 Conn. 419; 1 Yeates, 360; 3 Kent, 93-105 and notes; McKenny vs. Crawford, 8 Sergt. & R., 351; Berry vs. Robinson, 9 John., 121; 3 S. C. Const. Rep., 33; 3 Bailey S. C. Rep.; 457.

C. W. Jones, for defendant in error, cited: Brown vs. Davis, 3 T. R. 80; 5 Johnson, 118; 3 John. cases, 5; 4 Mass., 370; 6 Pick., 259; 7 Watts & Sergt., 331; 5 John., 118.

FORWARD, J., delivered the opinion of the Court.

This was an action of assumpist on a promissory note made by one John W. Cook, for \$800, alleged to be dated the 4th day of August, A. D. 1859, "payable to the defendant or order on the first day of January, after date, with eight per cent. interest after due." The declaration stated

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that the defendant, after the said note was delivered to him by said Cook, to-wit, on the 17th day of January, 1859, at Santa Rosa county, endorsed the said note to the plaintiffs, and the said John W. Cook did not pay the amount thereof, although the same was then presented to him on the day when it became due, of all which the defendant then and there had notice, and afterwards, in consideration of the premises, promised to pay the amount of said note to the plaintiff on request, &c. To this declaration the defendant in the court below plead: 1st. That said promissory note was not presented in manner and form as alleged. 2d. That he had not due notice of the non-payment of the said promissory note in manner and form as alleged. To which pleas a replication was filed, averring that the defendant endorsed the said promissory note to the plaintiff long after the said note became due and payable, according to the tenor and effect thereof. The replication was demurred to by the defendant, who said it was not sufficient in law, "because he says that an endorser of an over-due bill or note is entitled to notice, as though it was a bill drawn at sight." And at December term, 1859, the court overruled the demurrer and gave judgment against the defendant for the amount of the principal and interest due on the note. To which ruling and judgment the plaintiff in error then and there excepted, and brings his writ of error to this court.

The following are the errors assigned:

First. That the court erred in overruling the demurrer of the defendant to the replication of the plaintiff.

Second. That the court erred in giving judgment for the plaintiff upon the pleadings.

It is well settled law both in England and America that the endorsement of a promissory note, after it is due, is equivalent to drawing a new bill payable at sight, and it must be proceeded with as such unless there is some special agreement to the contrary. Chitty on Bills, 242.

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Judge Story, in his Treatise on Promissory notes, section 129, says: "It is in fact a request of the endorser that the maker (who stands in this respect very much in the situation of an acceptor) would pay the amount to the indorsee, or to any other holder, if the *endorsement is not restricted*. Indeed, it may be treated with strict propriety as an authority given to the endorsee to receive the money due on the note, and also an undertaking that it shall be paid to him upon due presentation, and therefore, as involving, in case of dishonor and due notice thereof, the ordinary responsibility of an endorser of negotiable paper."

The contract on the part of the endorser, (and in this case it will be noticed the endorser is the payee of the note,) was among other things, that if, when duly presented, the note was not paid by the maker, he, the endorser, would, upon due and reasonable notice given him of the dishonor, pay the same to the holder.

In *Berry vs. Robinson*, 9 Johnson, 121, the Supreme Court of New York say: "The plaintiff was properly nonsuited for not proving demand of payment on the maker and notice of his default to the endorser. The books make no distinction on this point, whether a note be endorsed before or after it is due."

So in South Carolina, in *Poole vs. Tolleson*, 1 McCord, 200, it was held that where a note is endorsed after it became due, demand must be made of the drawer, and notice of non-payment must be given to the endorser to make him liable.

See also *Stockman vs. Riley*, 2 McCord, 399, and 2 Nott & McCord, 283.

And in *Van Hooser vs. Van Alstyne*, 3 Wendell, 79, it is laid down that a note transferred after it is due to be considered payable on demand, and the demand and notice must be made in a reasonable time. What is a "reasonable

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time" is a question of law, where the facts are ascertained, to be decided by the court.

In Byles on Bills of exchange, page 346, the general rule is laid down to be that notice must be given before action brought, within a reasonable time and after the dishonor, and that what is a reasonable time is a question of law, depending on the facts of each particular case. See also Darbishire vs. Parker, 6 East., 3.

This being the law in cases like the one under consideration, it follows as a matter of certainty the court erred in overruling the demurrer to the replication and in rendering judgment against the plaintiff in error as endorser of said promissory note without proof of demand and notice.

Per curiam.—Let judgment be reversed and this cause be remanded back to the Circuit Court, with leave to the parties to amend the pleadings.

JAMES O'CONNOR, PLAINTIFF IN ERROR, VS. THE STATE.

1. A venire man stated on his *voire dire* that he had formed an opinion as to the guilt or innocence of the prisoner, but that such opinion was based on mere rumor; that he had not heard the witnesses or any one speak of the matter by detailing any of the facts or circumstances connected with the killing as of their own knowledge; that it would require evidence to remove the opinion so formed upon rumor, but that if taken upon the jury, he could readily and without hesitation find a verdict according to the evidence, although that verdict might be contrary to the opinion so formed on rumor. *Held*, that said juror was competent.

2. A venire man stated on his *voire dire* that "he, as Coroner of the county, held the inquest on the body of the person for whose killing the prisoner is on trial; that he heard all the evidence that was then before him, but that he had not formed or expressed an opinion as to the guilt or innocence of the prisoner at the bar." The record did not show what evidence was "then before him," or that there was any whatever pointing to the prisoner as the person

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who had committed the killing. *Held*, that said *venire man* was competent to be sworn in chief as a juror.

3. A *venire man* stated on his *voire dire* that he is related by blood to the prisoner ; thinks he is not so near related as second cousin, but that he may be third cousin. *Held*, that he was not competent to be sworn as a juror.
4. "There is no provision whatever in our law for issuing a special *venire factas*." "When by reason of challenges or otherwise a sufficient number of jurors duly drawn and summoned cannot be obtained for the trial of any cause, civil or criminal, or for the execution of a writ of enquiry, the court shall cause jurors to be summoned from the bystanders, or from the county at large, to complete the panel." These jurors need not be regularly drawn from the box, like the members of the regular panel, but they must have the same qualifications as those presented for the regular panel, that is to say, they must be free white male citizens of the United States, who are householders and inhabitants and residents of the State and county, above twenty-one years and under sixty years of age. In practice it is not error for the court to anticipate that the regular panel will be exhausted, and therefore in advance to order the Sheriff to summon any reasonable number of competent jurors to be present, so that they may be in readiness to be taken on the happening of the anticipated contingency.
5. The prisoner demanded that each juror, as he was tendered by the State and accepted by him, should be sworn in chief, which the court overruled, and each juror as he was tendered and accepted, was ordered into the box and kept under the eye of the court until the whole twelve were chosen, and thereupon the court ordered them to be sworn in chief, three at a time. *Held*, that this was not error. It is not error for the court to refuse to cause the jurors to be tendered to the prisoner again separately after he has once accepted them, but it is the right of the prisoner to retract his acceptance and object to a juror at any time before he is sworn in chief.
6. It is not error for the court to refuse to have the jury sworn "to find a verdict according to the law as well as the evidence in the case." The usual and proper form of oath is this "You shall well and truly try and true deliverance make between the State of Florida and ———, the prisoner at the bar, whom you shall have in charge and a true verdict give according to the evidence."
7. The verdict of the jury must be recorded before they are discharged. The jury having returned into court and having answered to their names, the court asked them if they had agreed on their verdict ; they answered they had, and handed the court the indictment, on the back of which was written : "We, the jury, find the prisoner guilty. CHARLES PRATT, Foreman." The court then said, "do you all say that the prisoner is guilty?" to which the jury assented ; thereupon, on motion of the prisoner, the jury was polled, and each juror answered guilty. Thereupon the court discharged the jury. *Held*, that this verdict was recorded within the meaning of the law.
8. When the verdict was simply "guilty," and there was but one count in the indictment, and that was for murder, although the jury under this count

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might have found the prisoner guilty of manslaughter, yet having found him guilty generally, it must be taken as referring to the offence in the indictment.

9. It is not necessary that the bailiff under whose charge a jury in a capital case retires or deliberates should be sworn for that particular case. It is sufficient if he be sworn generally for the term. If neither party asks for trials in a capital case, but submit the matter to the court, they are bound by its decision.

10. Under the naturalization act of Congress of 1802, the infant children of aliens, though born out of the United States, if dwelling within the United States at the time of the naturalization of their parents, become citizens by such naturalization, and the provisions of that act on this subject are prospective, so as to embrace the children of aliens naturalized after the passage of the act as well as the children of those who were naturalized.

11. If the evidence in a case be so conclusive that the jury could not have found any other verdict than that which they did find, the court should not set aside such verdict on the grounds of irregularity in the conduct of one or more of the jurors, unless such irregularity be gross.

This case was decided at Marianna.

Writ of error to Franklin Circuit Court.

The opinion of the court contains a statement of the facts connected with the several points decided by the court, the opinion giving the facts in the order in which the points are decided and sufficiently explaining the same.

D. P. Holland and *J. M. Gorrie* for plaintiff in error.

W. D. Barnes, for Attorney General, for the State.

WALKER, J., delivered the opinion of the court.

The plaintiff in error, having been convicted and tried at the fall term 1859 of Franklin Circuit Court, on an indictment for the murder of his wife Bridget O'Conner, sued out a writ of error to this court. The first juror called was S. K. Bull. The record states, that one of the regular panel, who, being sworn on his *voire dire*, said that he had formed an opinion as to the guilt or innocence of the prisoner, but that such opinion was based upon mere rumor; that he had not heard the witnesses, or any one, speak of the matter by

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detailing any of the facts or circumstances connected with the killing as of their own knowledge; that it would require evidence to remove the opinion so formed upon rumor, but that, if taken upon the jury, he could readily and without hesitation find a verdict according to the evidence, although that verdict might be contrary to the opinion so formed on rumor. Counsel for prisoner moved to challenge said juror for cause, but the court ruled that he was a competent juror. To this ruling the prisoner excepted and challenged said juror peremptorily. The court made the same ruling in the case of the next juror called, to wit: Francis E. Harrison, to which the prisoner also excepted and then challenged him peremptorily. These rulings of the court constitute the ground of prisoner's first assignment of error in this court.

Few questions have been more discussed than this one concerning the competency of jurors. We have taken much pains to sift the numerous and sometimes conflicting authorities, which the highly commendable zeal and industry of counsel in this case and our own investigations have brought to our attention, and endeavored to ascertain the true rule on this subject. We think we may adopt with safety as sound law the following extracts from 2 Graham & Waterman on New Trials, viz: Page 376 "Jurors ought to come to the investigation free from any preconceived impression whatever. But, as this, in the present condition of society, is frequently, if not generally, impossible, the law does not require in practice quite so much strictness. It has been well remarked, that, in an agricultural community like ours, of sparse population, identical pursuits, equal station and newspapers scattered far and wide, it has always been found a matter of much delicacy and difficulty—sometimes altogether impracticable—to procure a jury entirely unaffected by rumors touching the transactions upon which they are to pass."

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And again, (page 397,) Judge Breese, in *Smith vs. Eames*, 3 Scam. Rep., 76, expresses the idea as follows: "The human mind is so constituted that it is almost impossible, on hearing a report freely circulated in a county or neighborhood, to prevent it from coming to some conclusion on the subject; and this will always be the case while the mind continues susceptible to impressions. If such impressions become fixed and ripen into decided opinions, they will influence a man's conduct and will create, necessarily, a prejudice for or against the party towards whom they are directed and should disqualify him as a juror; but, if in obedience to the laws of his organization, his mind receives impressions from the reports he hears, which have not become opinions fixed and decided, he would not be disqualified."

"A distinction is drawn by some of the authorities between an opinion and a mere impression, it being held that the former will disqualify, but not the latter; but such a distinction seems to be rather nominal than real. An impression may be so strong as to be tantamount to an opinion, while opinions are often slight, vacillating and easily changed. It seems, therefore, that, although a juror may have formed an opinion, yet, if he has not definitely made up his mind, he is not necessarily liable to exception."—2 Dev. & Bat., 761.

"The true doctrine is, that if the juror's conceptions are not fixed and settled, nor warped by prejudice, but are only such as would naturally spring from public rumor or newspaper report, and his mind is open to the impressions it may receive on the trial, so as to be convinced according to the law and the testimony, he is not incompetent."

This court also adopts as sound law the ruling of the Supreme Court of Mississippi, that it is not necessary to exclude a juror that he should have formed and expressed his opinion against the accused with malice or ill will, but that a

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mere hypothetical opinion from rumor only, and subject to be changed by the testimony, does not disqualify. If a juror, however, has formed a fixed opinion, he ought to be excluded, though he may never have expressed that opinion. Wharton's Criminal Law, 852; State vs. Johnson, 1 Walk., 392; State vs. Hoover, *ib.*, 318.

"When the juror said he had formed and expressed an opinion from rumor only, but that his mind was free to act on the testimony, he was held competent. A juror being examined on his *voire dire*, was asked: 'Have you formed or expressed an opinion as to the guilt or innocence of the prisoner at the bar?' Answer, 'I have.' Question. 'Have you formed or expressed that opinion from common report or from the witnesses, or either of them?' Answer. 'Common report only; I have never heard any of the witnesses say anything on the subject.' Question: 'Will anything you have heard or said respecting the prisoner have any influence on your mind as a juror in the determination of this cause?' Answer. 'It will not; I feel free to decide the case according to the evidence which may be produced on the trial.' Such an individual was held to be a competent juror."—See Wharton's Criminal Law, 852, citing King vs. State, 5 Howard's Miss. Rep., 730; State vs. Johnson, 1 Walker, 392.

"The formation of an opinion by one who had heard all the testimony is a disqualification, while one who has formed a hypothetical opinion from rumor, and who at the same time declares he could render an impartial verdict, will be a competent juror. Between these extremes the qualification or disqualification must depend on the circumstances of each case."—Wheaton's Crim. Law, 853, citing Sam vs. State, 13 Smedes & Marshal, 189.

We hold that the above extracts express the true rule of law on this subject, and tested by them the ruling of the

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court below that Bull and Harrison were competent jurors was correct.

They swore that they had formed their opinion upon *mere* rumor; that it would require evidence to remove the opinion so formed on rumor, but that if taken upon the jury they could readily and without hesitation find a verdict according to the evidence, although that verdict might be contrary to the opinion so formed upon rumor.

To hold that these jurors were incompetent because they said it would require evidence to remove the opinion so formed on rumor, although they stated that if taken on the jury they could *readily and without hesitation* find a verdict according to the evidence, &c., would be to hold that no juror can be competent who has formed an opinion on mere rumor, because, if he has formed any opinion or impression, however slight, that opinion or impression must necessarily remain until removed by evidence; but as we have seen, such ruling as that would be against law. The very thing necessary to make a juror who has formed an impression from mere rumor competent, is that his mind must be in such a condition that all slight preconceived opinions or impressions may be readily and without hesitation removed by the testimony.

The fifth assignment of error is that the court erred in ruling Edward Carpenter as a competent juror.

Edward Carpenter, on his *voire dire*, stated that he was and is the Coroner of the county of Franklin; that as Coroner he held the inquest on the body of the person for whose killing the prisoner is on trial; that he *heard all the evidence that was then before him*, but that he had not formed or expressed an opinion as to the guilt or innocence of the prisoner at the bar.

The court ruled that he was competent, to which ruling the prisoner excepted and challenged him peremptorily.

What the evidence "*then before him*" was, the record does

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not show, nor, indeed, that there was any evidence whatever then before him pointing to the prisoner as the party who had committed the killing. Whatever it was, it seems not to have been sufficient to induce him to *form* or *express* an opinion. The only question, therefore, is whether the simple fact that he presided as Coroner at the inquest was sufficient to disqualify him as a juror. After much investigation we have been unable to find any rule of law which would make this fact alone render him incompetent. While we rule that the court below did not err in overruling the prisoner's motion to reject said juror, yet we may be excused for saying we think it would perhaps have been well for the court to have excluded said juror under the power confided to it by the 11th section of the act of 1846, which is in these words, viz:

"The court may discharge a person from serving as a juror who does not possess the requisite qualifications, or who is exempt or disqualified for such service, *or for any reasonable and proper cause, to be judged of by the court.*"

We make the suggestion upon the ground that jurors should if possible be not only impartial,, but beyond even the suspicion of partiality.

The fourth error assigned is that the court erred in ruling James O'Conner as an incompetent juror and allowing challenge for cause on behalf of the State.

The record states that James O'Conner said on his *voire dire* that he is related by blood to the prisoner, thinks he is not so near related as second cousin, but that he may be a third cousin.

We have no difficulty in saying that the court below did not err in this ruling. The juror was clearly of kin to the prisoner within the ninth degree. See 3 Black. Com., 363; 1 Chit. Cr. Law, 441.

The third assignment of error is that the court erred in overruling the challenge to the array of the special venire.

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The record on this point reads thus: "The regular panel being exhausted, the Sheriff proceeded to call the special venire, whereupon the prisoner challenged the array on the special venire, and alleged the following grounds: First, that it appeared that the court had ordered a special venire to issue for eighty jurors, and such writ had issued, and that the Sheriff had only returned seventy-one jurors instead of eighty, endorsing on the special venire that not more than seventy-one jurors could be found in his county. Second, That the Sheriff had not taken or drawn the names of the jurors from the box or list of the county of Franklin from which the regular panel was taken, but that the Sheriff had gone into the county and summoned seventy-one men whom he believed were liable to jury duty, and that such drawing and summoning the jury was not according to law, the Sheriff not having obtained the jury list of the county of Franklin, which motion or challenge the court overruled, to which ruling of the court the prisoner excepted."

No evidence appears in the record to support the facts alleged in this motion or challenge and for aught we know the court below may have overruled it on the ground that the facts alleged in it had not been made to appear. But taking it for granted that all the facts alleged in the motion were proven, still we think the court did not err in overruling it.

The wise provisions of our statute of 1846, cited by counsel for the prisoner, (see Tho. Dig., 345,) as to the manner of making out the list and drawing and summoning the jury, relates exclusively to the regular panel, but, as it was foreseen that the regular panel would be frequently exhausted, as was the case here, the 12th section of said act of 1846, provided for that exigency in these words, to wit:

"SEC. 12. When by reason of challenges or otherwise a sufficient number of jurors, *duly drawn and summoned*, cannot be obtained for the trial of any cause, civil or criminal,

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or for the execution of a writ of enquiry, the court shall cause jurors to be summoned from *the bystanders or from the county at large*, to complete the panel, who shall possess the same qualifications as prescribed in the provision of this act."

This section draws a plain distinction between jurors "duly drawn and summoned" and jurors taken from "the bystanders or from the county at large." The one class is not to be resorted to until the other has been exhausted. The "qualifications" of the bystanders or jurors taken from the county at large are to be the same as those of the jurors who have been "duly drawn and summoned;" that is to say, they must be householders, &c.

There is no provision whatever, in our law for issuing a special *venire facias*. The court might, if it thought proper, (and this would be a literal compliance with the law,) have refused to issue a special *venire facias* until the regular panel was exhausted, and then have "caused jurors to be summoned from the bystanders or the county at large" to complete the panel *instantly*. If this had been done the prisoner would have had little or no opportunity to look over the list and select his jurors, and the court and the jurors already taken from the regular panel, would have had to wait till the Sheriff could get jurors from the bystanders, (not always the best men to make jurors in an important case) or from the county at large. To prevent these difficulties the court anticipated that the regular panel would be exhausted, and therefore gave an order to the Sheriff to summon eighty men to be present, so that they might be in readiness to be taken if the regular panel should be exhausted.

The Sheriff obeyed this order, as far as he was able, by summoning seventy-one persons, returning on his writ that not more than seventy-one jurors could be found in his county. This was certainly nothing of which the prisoner

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could complain. The effect of the whole proceeding was to give him, in advance, a list of the names from amongst which the jury would be taken.

The English law on this subject is very much the same as our statute.—In 2 Black. Com., 365, it is stated thus:

“If by means of challenges or other cause, a sufficient number of unexceptionable jurors doth not appear at the trial, either party may pray a *tales*. A *tales* is a supply of *such* men as are summoned on the first panel, in order to make up the deficiency. For this purpose a writ of *decem tales*, *octo tales*, and the like, was used to be issued at common law, and must be still so done at a trial at bar, if the jurors make default. But at the assizes or *nisi prius* by virtue of the statute of 35 Hen., VIII. C., 6, and other subsequent statutes, the Judge is empowered at the prayer of either party to amend a *tales de circumstantibus* of persons present in court, to be joined to the other jurors to try the cause, who are liable, however, to the same challenges as the principal jurors. This is usually done till the legal number of twelve be completed, in which patriarchal and apostolical number, Sir Edward Coke hath discovered abundance of mystery.”

The practice of the English Courts under this law is substantially the same as that pursued by the court below, as will be seen by reference to the case of Rex vs. Dolby, 9, Eng. Com. Law R., 56.

The second ground of error assigned is, that the court erred in denying prisoner's demand to have the juror John B. Elton sworn in chief, when he was tendered and accepted.

The 6th assignment is that “the court erred in refusing that the jurors should be sworn, as each juror was tendered and excepted.”

The 8th assignment is that the court erred in swearing the jury three at a time.

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We will consider the 2nd, 6th and 8th assignments together.

It appears from the record that "the prisoner demanded that each juror, as he was tendered by the State, and accepted by him, should be sworn in chief, which the court overruled; and each juror, as he was tendered and accepted, was ordered into the box, &c., kept under the eye of the court, until the whole twelve were chosen, and thereupon the court ordered them to be sworn in chief," three at a time.

We think there was no error in this. It was but mere matter of form, not violation of any principle of law, or working any possible damage or injustice to the prisoner. We find by reference to Robinson's Forms, page 214, that the form of proceeding is as follows: "The Sheriff calls the first named on the panel, and upon his coming into court, the Clerk bids him look upon the prisoner; which being done, the Clerk asks the prisoner: "Are you willing to be tried by this man?" If the prisoner answers "No," the Clerk tells the venire man he may retire, and makes a memorandum of his name, as he will afterwards do of any others, who may be challenged peremptorily. But if the prisoner answers "Yes," the Clerk tells the venire man to sit in the jury box. After three others have been elected, the *four are called to the book* by the Clerk who administers to them the oath."

The usual practice in this State, in trial for felony, has been to swear the jury, only *one* at a time; and for the sake of uniformity, it would be well if that form were adhered to, unless some peculiar circumstance should exist to make a departure from it proper; but we are clear that a variance from it is no ground of reversal.

The seventh assignment of error is, that the court erred in refusing the right of the prisoner of tendering objections

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to the jury after they were chosen but before they were sworn in chief."

This assignment is based on the following extract from the record:

"The prisoner demanded that each juror, as he was tendered by the State and accepted by him, should be sworn in chief, which the court overruled, and each juror, as he was tendered and accepted, was ordered into the box and kept under the eye of the court until the whole twelve were chosen; thereupon the court ordered them to be sworn in chief. The prisoner then asked that the jury should be tendered again separately to him before they were sworn, so that, if he had any objection, he might then make it, which the court refused, and ordered the jury to be sworn three at a time, and the whole panel was sworn. To all of which rulings the prisoner excepted, the prisoner only having exhausted six of his peremptory challenges."

We have already ruled, in considering the 2d, 6th and 8th assignments, that the court did not err in ordering the jurors into the box until the twelve (12) were chosen, and ordering them to be sworn three at a time.

We now come to consider whether the court erred in refusing the request of the prisoner to have the jury tendered to him again *separately*, so that, if he had any objection, he might then make it. We know of no rule of law which requires the court to tender a juror to the prisoner again after he has accepted him, and we are equally clear that it was the right of the prisoner to retract his acceptance and object to a juror *at any time* before he is sworn in chief. A different doctrine seems to prevail in Connecticut. In that State, (see Wharton's Am. Crim. Law, page 860, citing State vs. Potter, 18 Conn., 166,) "B having been called as a talesman and examined as to his bias, and no reason to except to him appearing, the counsel for the prisoner were informed by the court that they could then challenge B per-

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emptorily if they desire to do so. They declined to exercise the right, as the panel was not then full, and B was directed to take his seat as one of the jurors. After the panel was full and but six peremptory challenges had been made, the prisoner's counsel claimed the right to challenge B peremptorily. It was held, that in the absence of any reason for any peremptory challenge then, which did not exist before when the exercise of the right was declined, it was too late to challenge B peremptorily."

A strong argument in favor of this ruling in Connecticut is, that it prevents a prisoner from experimenting with the jury by declining to challenge peremptorily until a full panel is obtained, and then, when he wants to exchange a juror whom he has taken for another whom he thinks he can get, to enable him to do so. But, in *favorem vitae*, we adopt the doctrine as laid down in Virginia, in the case of *Henrick vs. Com.*, 5 Leigh, 708. In that case, D. Hudson being called as a juror, the prisoner elected him, but, as the juror was taking his seat and after the Sheriff called another juror, the prisoner objected to Hudson, and one of his counsel stated that the prisoner was acting under his advice in relation to his challenges, and in electing Hudson had mistaken his advice, and he insisted that the prisoner had a right to retract his election of this juror and to challenge him peremptorily. But the court below refused to permit him now to make such peremptory challenge, and this juror was sworn and served as one of the jury. The prisoner excepted and took the case to the General Court of Virginia, which ruled as follows, viz: "We think that the court below erred in refusing to permit the prisoner to retract his election of the juror D. Hudson and to challenge him peremptorily. Some circumstances are stated to show the reason of this decision which it is not necessary to advert to, for this court is unanimously of opinion that the right of a prisoner to challenge any juror peremptorily is absolute at

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any time before the juror is sworn, and that no circumstances can bring that right within the discretion of the court so long as it is confined to the number of peremptory challenges allowed by law.”

Holding this ruling of the General Court of Virginia as correct, we are of opinion, that if the prisoner, at any time before any juror was or jurors were sworn, had retracted his election of such juror or jurors and expressed his desire to challenge him or them, it was his right to do so until the whole of his peremptory challenges were exhausted. But the record does not show that the prisoner retracted his election of any juror or jurors and challenged him or them peremptorily, or even expressed a desire to do so. It shows only that the prisoner “asked that the jury should be tendered to him again separately before they were sworn, so that, if he had any objection, he might then make it.” The prisoner did not state, (so far as we can learn from the record,) that he had any objection, or that he would make any if the jury should be tendered to him again separately, but only that they might be tendered to him again separately, so that, *if* he had any objection, he might then make it. It would have been a useless ceremony for the court to have tendered to him the jurors again separately after he had once accepted them in the absence of any declaration on his part that he desired to object to any of them. If such had been the right of the prisoner and the jury had been tendered to him again separately, he might again have elected them and then again have asked that they be tendered to him separately, so that there would be no end to the process. And, besides, his right of challenge peremptorily did not depend on the tendering of the jurors to him again separately. That was a right which he might have exercised at any time before a juror was sworn, and it did not depend on whether the jury was called up to be sworn one at a time or three or more at a time. Having once

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elected them, that election remained good until he declared his desire to retract it, and not having made any retraxit or expressed even a desire to do so, we hold that the court did not err in ordering the jury to be sworn.

The 9th error assigned is, that "the court erred in refusing to have the jury sworn to try the prisoner according to the law and the evidence."

The record does not state the precise form of oath which was used in this case. It only recites the names of the jurors, and then says: "Who being *duly elected, tried and sworn,*" &c. In a subsequent part of the record, that is in the bill of exceptions, it is stated that "the jury was sworn three at a time, to find a verdict according to the evidence in the case, when the prisoner, by his counsel, moved that the jury be sworn to find their verdict *according to the law* as well as the evidence in the case, which motion the court overruled, to which ruling the prisoner excepted."

The usual form of the oath, as prescribed in Robinson's Forms, is thus: "You shall well and truly try and true deliverance make between the Commonwealth and T. T., the prisoner at the bar, whom you shall have in charge, and a true verdict give, *according to the evidence.*"

In 1st Chitty on Crim. Law, page 552, the same form is given as the correct one, and so we hold.

The tenth assignment of error is that the court erred in discharging the jury before the verdict was recorded as ordered to be recorded. The bill of exceptions states that the jury having returned into court, and having answered to their names, the court asked them if they had agreed on their verdict; they answered they had, and handed to the court the indictment, on the back of which was written, "We, the jury, find the prisoner guilty. CHARLES PRATT, Foreman." The court then said, "Do you all say that the prisoner is guilty?" to which the jury assented. Thereupon, on motion of the prisoner, the jury was polled, and each

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juror answered guilty. Thereupon the Court discharged the jury. The counsel for the prisoner then objected that the jury had been discharged before the verdict was recorded, which the court decided was not necessary, &c.

There is no doubt that the law, as contended for by counsel for prisoner, is correct, that the verdict must be recorded before the jury is discharged—See 10 Bacon, 306; Graham Prac., 317; Graham & Waterman on New Trials, 1406; Chitty's Crim. Law, 635, 647; Black. Com., 378; 3 Graham & Waterman on New Trials, *note* on page 1409.

But the question arises, what is meant by recording the verdict? It cannot mean that it must be regularly written down in the minutes of the court. We know that this is never done. The Clerk usually makes a brief memorandum on the indictment or on his docket, and this is all that has ever been deemed necessary. In this case, the jury *themselves* recorded their verdict on the back of the indictment, one of the files of the court. They brought their verdict so recorded into open court. The court then asked them, "Do you all say that the prisoner is guilty?" To which the jury assented, and thereupon, on motion of the prisoner, the jury was polled, and each one answered that he found the prisoner guilty. This we think was a sufficient recording of the verdict within the meaning of the law. In the case of Frier vs. The State, 3 How. Miss. R., the court say: "In this case, the verdict was opened in the presence of all the parties and read aloud by the Clerk to the jury. The prisoner was thus afforded ample opportunity to poll the jury. It was then *a public verdict, spoken by the jury*, and we can see no reason for disturbing it on that ground." And, again, in the case of the Com. vs. Gibson, 2 Va. Cases, 73: "In a case of felony, after the verdict is rendered by the jury and read in open court, it is the duty of the Clerk to direct the jury to hearken to their verdict as the court has recorded it, and then to repeat the verdict to them, and either to poll

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them or say to them, 'And so say you all,' or words to that effect; in which latter case, if none of the jury express their dissent, the verdict ought to stand *as recorded*, and until *the assent of the jury is expressed in one of these ways*, the jury have a right to retract it, and *until after the assent of the jury is expressed as aforesaid*, the verdict is not perfect."—See Robinson's Forms, 222.

We are satisfied, from the record, that very much the same ceremony took place in this case as in the Virginia case just cited. In this case, the *Clerk* did not repeat the verdict and ask them if they assented to it as recorded, but the *Judge*, being in possession of the written verdict, repeated the substance of it to the jury, by asking them, "Do you all say that the prisoner is guilty?" When they all assented, even after being polled, that that written verdict was their verdict, the court must be considered as having adopted it as its own record, just as much as if the Clerk had made it. It may be that the true rule is that the verdict is considered as recorded, in the eye of the law, when it is *pronounced* by the jury in open court and in the presence of the parties. The cases just cited from Virginia and Mississippi seem to point to that conclusion, but it is not necessary for us to decide that question now, and we will content ourselves with deciding that the facts shown by the record in this case concerning the recording of the verdict are not such as in law to vitiate it.

The 11th assignment is, "that upon the verdict in the record no sentence could be passed nor execution had."

The verdict was simply "guilty." There is but one count in the indictment, and that is for murder. The jury might, under this count, have found the prisoner guilty of manslaughter, but having found him guilty, it must be taken as referring to the offense in the indictment.—See 1st Chitty C. Law, 635—'67. If there were different degrees of murder in this State, punished by different penalties, as is the case

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in some States, it would be necessary for the verdict to discriminate.

The 12th and last assignment of error is, that "the court erred in refusing the motion for a new trial."

The 11th ground on which a new trial was asked was, that the jury, when they retired to deliberate on their verdict, were not placed under a bailiff sworn for that particular case, but under a bailiff only sworn for the term. The record sustains this allegation. Is that fact alone a sufficient ground for a new trial? We think not. We cannot perceive why the oath, taken by a bailiff to discharge his duty faithfully during the whole term is not as binding on his conscience as would be an oath taken for a particular case. There is no question that the Sheriff might properly have charge of the jury, and yet he takes no oath except his oath of office. This bailiff seems to have felt the force of his obligation, for the record shows that when one of the jurors attempted to communicate to him something concerning the trial, he said to him: "Don't tell me anything about it. I don't want to know anything you have to tell as a jurymen, for I am sworn not to say anything to you, nor you to me." In many courts, however, at the present day, it is not unusual that officers are sworn at the commencement of the term to take charge of all juries in civil cases, and probably there is no reason for greater caution in criminal cases.—Commonwealth vs. Jenkins et al., Thach. C. C., 131; 2 Graham & Waterman on New Trials, page 375, note.

In our sister State of Georgia, even the jurors are sworn for the whole term. The record states that the jury retired under charge of a sworn bailiff, to consult of their verdict. In the absence of testimony to the contrary, the court must be presumed to have done its duty, and that the bailiff was fully instructed by the court as to the nature of his duties. This ground for a new trial is not good.

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Another ground urged for a new trial before this court, though nothing is said of it in the record, is, that the court acted as a trier of the qualifications of jurors.

The law on this subject, as laid down in 3 Black. Com., 363, is this: “Challenges *to the favor* are where the party hath no principal challenge, but objects only to some probable circumstances, as acquaintance and the like, the validity of which must be left to the determination of triers, whose office it is to decide whether the juror be favorable or unfavorable. The triers, in case the first man shall be challenged, are two indifferent persons named by the court, and if they try one man and find him indifferent, he shall be sworn, and then he and the two triers shall try the next, and when another is found indifferent and sworn, the two triers shall be superceded and the two first sworn on the jury shall try the rest.”

But it is stated, in Wharton on Am. Crim. Law, 862, that if neither party asks for triers, but submit the matter to the court, they are bound by its decision, and this we hold to be the proper rule.

The third ground for a new trial was, that Petry, one of the jury, was not a citizen of the United States.

The evidence on this point is, that the juror was born in Bavaria; came to this country while an infant, with his father; has never taken out naturalization papers, but his father did many years ago, and while the juror was still an infant.

“Under the naturalization act of Congress of 1802, the infant children of aliens, though born out of the United States, if dwelling within the United States at the time of the naturalization of their parents, become citizens by such naturalization; and the provisions of that act on this subject are prospective, so as to embrace the children of aliens naturalized after the passage of the act, as well as the children of

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those who were naturalized.”—See *West vs. West*, 8 Paige, 664.

This ruling, which we adopt, makes the juror a citizen. There was therefore no error in the court below having refused a new trial on this ground.

We have now disposed of all the grounds alleged for a new trial except those growing out of the evidence before the jury, and the evidence afterwards taken before the Judge on the application for a new trial concerning the alleged misconduct of the jury. In order to determine whether the court erred in refusing a new trial on either of these grounds, it is necessary to read and consider the evidence attentively. The evidence before the jury was as follows:

Mrs. Vashti Maddox, being sworn, says. I know James O'Connor, the prisoner; I know another man of the same name; the prisoner is older of the two; I lived near the prisoner last winter, and at the time of the death of his wife, who was called Biddie; they lived together as man and wife, claimed each other as man and wife; about 2 o'clock in the evening, while at work in my garden, I heard a screaming and raised up and looked, and Mrs. O'Connor was *hollering*, and screamed three times for witness' husband to go there; my husband was not at home; she was hanging to the gate, and her husband took hold of her and told her she might *holler* and scream, but he would finish her before to-morrow morning, if she went to go in the house; I did not see her try to go in the house; I saw his elbow move and thought he was striking her, but did not see him strike; she said, kill me, Jim, kill me. but I'll go in; this was at the house where they were living at that time; when I saw them next, he had her by the hair dragging her around the end of the house, and this was the last I saw until she was found dead next morning; saw her early in morning; when carried to the house she was dead; I saw a bulk which I supposed to be her before she was removed,

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just below the place where the jail fence and Dave Walden's fence joins; in December of 1858, when these things occurred, in Franklin county; I helped to shroud her; I saw her before she was undressed; same dress she had on day before; gashes and bruises all over the body when I saw it after her death, and over the right eye a bad gash, and on the other a bad cut, ranging down the face; I will not be certain as to the side of the face; there was a wound upon the nose which appeared as if it might be done with a piece of iron; I saw much blood there; bed and pillows dripping with blood; I saw prisoner in his yard the next morning after the evening I have first testified about; I saw clothes after, poured out of a sack, which was said to be found under the house; I saw some check shirts, like the ones prisoner generally wore, and looked like an under-dress of hers, and a bonnet, the same I saw her have on the evening before, and the clothes were all bloody; I saw a knife taken by somebody and it was bloody; knife taken up from chimney; she laid down the knife; I saw a knife that the deceased cut meat with in cook room, which looked like the same knife, but cannot say it was the same knife; it was what they call a sheath knife; the prisoner and his wife lived in a little shanty, very small, but two rooms and the cook room; there was blood on the floor and blood all over Irish potatoes under the window in the bed room; I lived near them; heard a fuss in the night; my husband waked me up; noise heard was very heavy groans, (bad, dark, stormy night), sounding like one very sick or with a fit on them—a very struggling groan; I never had the knife in my hand; there was nothing particular about the knife, that I noticed, which would enable me to know or identify it; at that time no person lived in the house with prisoner and his wife.

Cross-examined—House on the street opposite the jail; some thirty feet, I suppose, from jail fence to prisoner's

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house; may be as wide at street; I was at the palings and saw through them, I think after 2 o'clock; prisoner talked short, not very loud; width of street between Picket's house and O'Connor's house; the gate being right at edge of side walk; they were at the gate at the time I saw them; garden enclosed within jail fence, which is about 6 or 8 feet high and foot boards 2 inches apart; same fence there now; it was through the cracks I looked and saw them, a few steps from the fence; did not go nearer to fence at time, but simply raised up and looked.

Re-examined by State. Cracks wide enough for me to see; nothing growing up outside; could see what I saw distinctly.

Mrs. Gordon.—I know the prisoner; I lived near to where he lived at the time of the death of his wife; I saw prisoner the evening before the death of his wife drag her in at the back door of his house out of the lot; he was forcing her into the house; that is all I saw; I heard nothing passing between them; he had hold of her by the shoulders, this was after dinner; I cannot say what time it was in the afternoon; I believe his wife's name was Bridget; I saw her after she was dead; I can't tell her condition.

No cross-examination made by prisoner.

Mrs. Pickett.—I knew the prisoner; I remember the evening when his wife was killed; I lived near them at that time; prisoner and his wife lived then together; I saw her run out from the door and prisoner after her, and he caught her at the gate and went dragging her to the door by the hair of her head; I saw her after she was dead; she was lying on the ground in the street; it was a rainy night; commenced raining in the evening; it was just at day-light next morning when I saw the body; it was between three and four o'clock in the evening when I saw him pulling her by the hair of the head.

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Cross-examined.—Was told that a woman was lying there dead, and I went out.

H. W. Pickett.—I know the prisoner; he lived with woman as his wife; I knew the woman; she was found dead about the 20th December last; a negro boy came and waked me up and told me there was a woman dead out in the street; I got up and dressed and went out and found Mrs. O'Conner lying there, and went to the Coroner without disturbing the body; I put the body on door shutter, with the help of several men, and carried her in the house; body, when I found it, was lying on her back, clothes straight, arms lying by her side; I saw one gash on her head at that time; gash an inch long or longer; looked like it was to the bone; no blood in it; looked white; blood under back of head when we lifted the body; I saw a bundle, but did not see it taken out from under the house; in the house the next morning; I did not see much out of the way in the house, in the room I was in at first; afterwards found blood on the floor of bed room; some blood on the floor, but not a great deal; something thrown over it; blood not in pool; did not lay thick on floor; sprinkled in places, may be two or three feet long; looked like blood; I saw bloody clothes; I saw some women's clothes, dress it may be; I saw a man's shirt; it was bloody on the sleeve and on the breast; don't know whose shirt it was; O'Conner took the shirt afterwards, and took it into jail with him; either a check or hickory shirt; it was with the other bloody clothes; don't remember bonnet; no one lived with prisoner and his wife at that time; body was lying 80 or 100 yards from O'Conner's house; but little sand, but grassy between where the body lay and prisoner's house.

Cross-examination.—Saw the bloody clothes at end of house; house 15 or eighteen inches above the ground; no boards around it at the end where I saw the clothes; part may have been boarded up, but a hole under the house,

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which I recollect. By a juror.—I said that when the body was found it had been rained upon; I heard no noise that night; my house is nearer to prisoner's; that when I supposed lodged at that time.

Mrs. Robinson.—I know the prisoner; I knew Bridget O'Connor; they were man and wife; I saw her in her house the morning after her death; some of the clothes looked like his clothes and some looked like her clothes; they were all bloody; one a checked shirt and the other a white or kind of inside shirt; I saw her inside clothes; I saw a sun-bonnet which was check and kind of gingham; the clothes which were hers were bloody; a knife dropped out of the bundle; it was a kitchen knife with long blade; was blood on the knife; it was taken, I think by the Coroner; I did not show the knife to Mrs. Maddox, but she was there, and think she saw it; I was in the house next morning; I saw blood on pillows and sheets, and bed in bed room; some places looked like it was washed off, but not all washed off; was blood on floor; some blood all over the floor.

Cross-examination waived by prisoner.

Dr. Hunter.—I know the prisoner; knew his wife; I am a practicing physician in this town; made a *post mortem* examination of the body of the deceased about the 21st December last; a chop, as with a knife, over the right eye, extending from the eyebrow upwards to about the edge of the hair, almost perpendicular; the other cut, from the same cut down to top of the ear, seemed to have been done with a heavy knife, with a chopping stroke; the first cut not dangerous, but the second severed a branch of the temporal artery, which would produce death in three or four hours, generally, if not attended to; on the left side was a wound from the ear, severing the top of the ear, entering skull rather back and over top of the ear, a septum which wounded another important artery, the submutal artery or uricular artery which would cause a considerable flow of blood; ten

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wounds on the head, one of them where parital occipital and temporal bones unite; as though the wound was stricken from behind, or when the head was turned away, and calculated to produce death, having entered the skull; two stabs with the point of knife, near the right ankle, severing an artery from which much blood would flow, abdomen much bruised as though it had been kicked; nose appeared to be stricken with a heavy missile, as with a brick or half brick; neck bruised; legs, hands and feet; thighs much bruised, the last as if with a boot or shoe; the uterus was perfectly excised; the protrusion from inverted womb excessive; died loss of blood; house all covered with blood, particularly in the room in which she slept; flag or cat-tail scattered over the floor; an attempt had been made to wash off the blood; a quart of blood or more in pool back of the bed; flags had no blood on them, except when turned over, and had been thrown upon the blood; I should think the blood I saw would bleed anybody to death; don't know the quantity, but think at least 6 or 7 lbs; they lived together (and by themselves) as man and wife.

No cross-examination.

H. W. Pickett recalled by State to prove a fact which the Solicitor says was inadvertently omitted.—I saw no blood on the clothes of deceased when I first saw her lying in the street; saw no sign of soil or blood on dress; I did not notice it; she was very wet; I went to house of prisoner to get him to open the door, so as that we could take her in the house; the door was closed; he was inside the house, standing at the window and looking through the window.

This is all the evidence that was before the jury. Most of it is circumstantial, but the circumstances all point with such direct and overwhelming force to the prisoner as to leave no rational doubt that he is guilty of one of the most cruel, barbarous and unnatural murders that it is possible for the imagination to conceive of. If this murder had been

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committed on the body of a *man*, it would have been shocking; if it had been committed on the body of a woman who was a stranger to him it would have been most revolting; but committed as it was, on the body of his own wife, in comparison with whose safety he was bound by every obligation of Heaven and of earth to regard his own life as but "the small dust in the balance," it was shocking, revolting and horrible far beyond the power of human language to express it. It was not by a single blow given in the heat of passion, that the prisoner extinguished the life of his most unfortunate wife. Much time must have been consumed and different instruments used, to inflict all those bruises, cuts and most fiendish lacerations and mutilations which the dead body exhibited.

The evidence of the prisoner's guilt is too plain for argument. He and his wife lived alone in a small shanty. In the afternoon he is seen dragging her by the hair of her head, and threatening to "finish her" before morning; his arm is seen moving as if he was striking her, and she is heard screaming for assistance. The next morning, after a dark and stormy night, her dead body is found near his house with little or no blood on it, but the floor of his house is found "covered all over with blood," the pillow and sheets of her bed are "dripping with blood," a bloody knife is found in his house, and her bloody clothes, with a bloody shirt of his own, are found in a sack under his house; he is found in the house looking out at the window. None of these circumstances are palliated or explained away.

With this testimony before them the jury had but one duty to perform, and that was to find the prisoner guilty.

The subsequent evidence before the Judge on the application for a new trial, concerning the misconduct of the jury, was as follows:

John M. Gorrie, being duly sworn, testified as follows:

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On the day when this verdict came in, heard the bell ring; walked towards Court House; as I came to the sidewalk, near Court House I saw Mr. Carrigan walk down the steps; at same time Williamson and Coley were coming down; Mr. Carrigan walked under the steps; I saw no sworn officer in attendance upon him; he walked out and went up stairs alone; I saw no officers in sight; I heard one of the jurors (Mr. Orman) say that the jury examined the law books which were in the court room and looked at authorities which had been quoted by counsel; that Donald McDonald (not stated who in ground for new trial) got up, made some remark or other and then, he said, they went into a vote; they amused themselves by reading books, as they had nothing to do, and did not tell me that it had influenced his verdict, but, to the contrary, it had not, and he supposed no other person was so influenced.

John Milligan, being duly sworn, testified as follows: I was sworn as bailiff during the present term; was not sworn specially for jury in the case; I had charge of the jury most of the time; Mr. Lucas assisted; I mentioned to him (Mr. Carrigan) you are a terrible set of fellows in there; he said we can't agree—no chance to agree; I said, don't tell me anything at all about it, I don't want to know anything you have to tell me as a jurymen, for I am sworn not to say anything to you, nor you to me; oh, says he, I had forgot all about it; I told him not to say anything more, and he did not; he said Cullen and him were holding out, (this he told me voluntarily, without my asking any questions,) but I am afraid he will give out as he is hungry, &c.; as for me, I will stay here until my toe nails drop off before I give in another inch; all this was said before he said as above that "I had forgot," &c.; I did not notice the jury examining said books; the conversation was at foot of steps that led down from the court room; he went out to make water; I saw no one else attempt to influence verdict.

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Martin Carrigan being duly sworn, testified as follows: I was a juror in this case; I heard the testimony of John Milligan; I was the juror with Milligan; I do not remember the expression of Milligan that we were a terrible set of fellows; I was coming up the steps buttoning up my pants; he asked, how do you stand? and I said ten to two, Cullen and I; this is all I remember to have passed at that time; he upbraided me for having talked at all; said he was an officer and ought to be no talk at all; I then went into the room; all that I recollect I said; I said nothing about toenails; he said nothing to me to influence my verdict.

William Petry, Sr., being duly sworn, testified as follows: I am father of William Petry, Jr., one of the jurors; he was not born in the United States; was born in Bavaria; he is near 23 years old now; he came here in 1840; he never took out naturalization papers as far as I know, but I have 12 or 13 years ago.

William Petry, Jr., being duly sworn, testified as follows: Don't remember how old I was when I came to this country; never took out papers of naturalization.

H. K. Simmons, being duly sworn, testified as follows: I had jury in charge several times, and the bailiffs, Mr. Lucas and Mr. Milligan, both sworn; Lucas sworn as Deputy Sheriff; jury was put in court-room by order of the court between 2 and 3 o'clock in the morning; I took all notes of evidence and removed from the room; court instructed the jury not to examine the books; I found books open and closed them; from 3 o'clock until after breakfast; 11 to 1 dozen volumes of books in the room; don't know that the jury used the books.

Martin Carrigan (recalled)—I came out to the officer; asked him to go down with me; I wanted to make water; he went with me to the top of the stairs, and told me to go down and do what I had to do and come up again; the officer was standing at the top of the stairs until I got through

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and came up to go into the jury room; he could not see me when I went under the stairs; I staid but a very short time, say two or three minutes—no longer than I was obliged to stay; I did not talk with any one, or any one with me; the officer was at the head of the stairs when I came back; I did not see any reading the law books, but for amusement and to keep them from sleeping; I do not know that the jury read any of the law used in the argument and made no use of it.

Thomas Mathews, a juror, testified as follows: That he separated from his fellow jurors upon a call of nature; he went out in the street about forty or fifty yards from the jury room; that he being compelled to go, asked the bailiff to go with him, who said he would not leave the balance of the jury, and that he would trust him by himself; that juror's absence was about five minutes, and that during his absence he did not converse with any person whatever about the case or anything else.

John Lovett, Sr., sworn for defendant.—I know Martin Carrigan, a juror in this case; in April or March last, prior to this trial, Martin Carrigan said the prisoner would be hung; I said he would not; he said that the prisoner would, and then we bet a hat or a pair of shoes on it and shook hands on it. Cross-examined.—the bet was made before O'Conner was on trial; I bet in earnest; Carrigan never said a word to me about the bet from that day to this, nor I to him, and I never mentioned the matter until after the prisoner was found guilty.

Martin Carrigan, a juror, testified: That some time during the year he was in conversation with several persons in regard to the case, and the question of the prisoner's guilt or innocence was brought up, and one Lovett (the witness) offered to bet that the prisoner would not be hung, and juror said he would bet him that he was already "well hung," meaning thereby he was well hung in an animal

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sense; in *forma tauri*; that said bet was made in jest; that juror had not since thought of it, and that it did not occur to him during the trial, and did not in the least influence his verdict, and the juror said that was the only bet he made.

This closed the testimony for new trial.

This testimony exhibits some irregularities in the jury, but not sufficient as we think, after a strict investigation of the authorities, to vitiate their verdict. When this evidence is taken in connection with the testimony before the jury, showing plainly that they could have found no other verdict than that which they did find, we are very clearly of opinion that the court did not err in refusing to grant a new trial. Nothing, therefore now remains for the court but to discharge the painful duty of declaring that the judgment of the court below is affirmed.

Let this case, therefore, be remanded to the Circuit Court in and for the county of Franklin, and the Judge holding said court be directed to cause the said James O'Conner to be brought before him in open court, and nothing appearing why sentence of death should not again be passed upon him, that said Judge, in open court, do re-sentence the said James O'Conner to be executed, at such time and place as the said court may deem fit and proper, and that said court do cause said sentence to be carried into execution.

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CLEM MURRAY, PLAINTIFF IN ERROR, VS. THE STATE.

1. As a general rule when an indictment is defective on demurrer, advantage may also be taken of the defect on motion in arrest of judgment.
2. The general system of legislation in this State has been to keep up a distinction between the *punishments* to be inflicted on white persons and slaves for the same violation of the criminal law, and also to keep up the distinction in statutory offences. White men and slaves will not be considered subjects of a common statute, unless clearly manifested.
3. If, from a view of the whole statute, together with the history of our legislation, the intention of the legislature to include slaves is manifest, they will be considered as included and held responsible in the word "person."
4. The legislature of this State did not include *Slaves* in the first and second sections of the act of 27th February, 1839, making a statutory offence for any *person* to keep a gaming table, and prohibiting betting and playing at such table.

This case was decided at Marianna.

Writ of error to Franklin Circuit Court.

The opinion of the Court contains a statement of the case, to which reference is made.

Anderson & Milton for plaintiff in error.

W. D. Barnes for Attorney General for the State.

FORWARD, J., delivered the opinion of the Court.

Clem Murray, a negro slave, was indicted in the Circuit Court, holden in and for the county of Franklin, under an act approved 27th February, 1839, and entitled "an act to amend an act entitled an act relating to crimes and misdemeanors," approved Feb. 10th, 1832, and under an amendment of the act of 1839, entitled "*an act to change and modify the penal statutes in reference to gaming*," passed 8th January, 1853, and under the 61st section of an act entitled "an act relating to crimes and misdemeanors committed by slaves, free negroes and mulattoes," passed Nov.

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21, 1828. See Duval's Comp. page 228; Thomp. Digest, 541; Duval's Comp. 127; Thomp. Digest, 501, and Pamph-Laws of 1863, page 117.

The *first* section of the act of 27th Feb., 1839, (see Thomp. Digest, page 501,) reads as follows, viz: "If any person, by himself or herself, servant or other agent, shall keep, have, exercise or maintain a gaming table or room or any house, booth, tent, shelter or other place for the purpose of gaming, or in any place of which he or she may have the charge, control or management, procure, suffer or permit any person or persons to play for money or other valuable thing or things, or to bet or wager on such as may play for money or other valuable thing, or things, at any game, whatsoever, he, she or they so offending may be indicted, and on conviction shall pay a fine not exceeding two thousand dollars nor less than two hundred dollars, and be imprisoned not more than six months, nor less than thirty days, at the discretion of the court."

The second section is as follows, viz:

"If any person or persons shall play and bet at any gaming table or at any gambling house, booth, tent or shelter, at any game of cards, dice, or checks, or with any other instrument, article or articles, thing or things whatsoever, for the purpose of winning or losing, he, she or they so offending may be indicted, and on conviction, shall be fined in a sum not exceeding fifteen hundred dollars, and not less than ten dollars, and imprisoned for any time not exceeding six months, and not less than one month, at the discretion of the court."

The 61st section of the act of 1828 is in the following language, viz:

"If any negro or mulatto, bond or free, shall commit any other crimes or misdemeanors against the laws of this State, it shall be lawful for the jury convicting him of the

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same, to punish him by such number of stripes as they may award, not exceeding one hundred.”

There are two counts in the indictment; in the first it is alleged that the said slave did then and there play and bet at a gaming table, at a game of cards, to-wit: at poker, with one Jim Dunham, and better known as Jim Deblois, for the purpose of winning, &c.

In the second count, he is charged, that he did then and there, in a place of which he then and there had the charge, to-wit: in the house known as the said Clem’s barber shop, permit one Jim Dunham Deblois, a negro, then and there to play for money, a game, to-wit: at a game at cards, &c. To this indictment he pleaded not guilty—was tried—found guilty, and the jury assessed his punishment at fifty lashes.

Afterwards a motion was made in arrest of judgment upon the following grounds, viz:

1. That the indictment does not set forth any offence punishing this class of persons.

2. That there is no statute in this State which punishes a negro bondman for playing and betting, or for keeping a gaming table, or makes it an indictable offence.

3. That the indictment does not set forth the offence or either of them with certainty and with particularity.

Which motion the court overruled, and the defendant from said judgment sues out his writ of error to this court.

The first question presented is, whether these objections could be raised on a motion in arrest of judgment. At common law an objection which would have been fatal on demurrer, was generally equally fatal in motions for arrest of judgment.

Had the indictment been demurred to before trial, its defectiveness would have been considered; therefore, as a general rule, advantage may be taken of the defect on motion for arrest.

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The next and main question arises under the first and second errors, to wit: Whether the *offence* created in the above recited act, making the playing and betting at a gaming table, and permitting another to play for money in a place under his charge, is extended to slaves, and whether slaves are embraced in the act and punishable under the 61st section of the act of 1828.

It is contended by the counsel for the defendant, that as the offence is a statutory offence, not enumerated in the criminal code for slaves; it cannot be extended to them unless specifically named, or it is the clear and manifest inference from the act, that the Legislature intended to include them; that the Legislature could not have intended to include them, *first*, because it is not an offence committable by slaves; *second*, because the offence is embraced in the general act relating to crimes and misdemeanors committed by white persons, passed in 1832, and amended in 1839, many years after the general act relating to slaves, and many years after the said 61st section of the act of 1828 was passed, and the punishment fixed by the act, creating the offence, clearly indicates that the Legislature did not intend to bring slaves within its provisions.

On the part of the State it is contended, by the acting Attorney General, *first*, that playing and betting at cards and permitting such gaming, are offences which can be committed by a slave, and therefore brings them within the act; *secondly*, that slaves may be guilty of many of the offences which may be committed by white persons; *thirdly*, that the punishment for the white man and slave are different, although the offence is under the same act, (i. e.,) that the offence is created under the first and second sections of the act of 1839, but that the punishment for a slave is fixed by the 61st section of the act of 1828; *fourthly*, that

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under the term "*person*," in the act, are included slaves as well as white persons.

In construing this statute and enquiring what was the intention of the Legislature, we are to look to the history of the legislation of our State on this subject and also to the rules of construction as laid down by authorities worthy to be adopted as precedents for us to follow.

The legislation of our State as to *punishment* of crimes committed by white persons and slaves, was fully reviewed in the case of *Luke vs. the State*, 5 Florida, 192; and the conclusion of this court in that case, was, that it was intended to establish and preserve a distinction between the *punishments* to be inflicted on slaves and free persons of color, and those on white persons for the *same violations* of the criminal law. And it was held in that case, which was an indictment for *malicious mischief*, that the slave could be indicted under the statute creating the offence, and punished under the 61st section of the act of 1828, although a different punishment would have been inflicted upon a white man.

But it will be observed that in the case of *Luke vs. the State*, the court held that malicious mischief was an offence that *could be committed* by a slave—malicious mischief being indictable at common law.

If we follow up the legislation of our State, in the same spirit that was done in the case of *Luke vs. the State*, as to punishment, we cannot fail to discover that our legislature, in establishing a general code for crimes, misdemeanors, and statutory offences committed by white persons, and another and separate code for slaves and free negroes, intended carrying out a *distinction*, and not make the white man and the slave subjects of a common system of laws, unless clearly manifested.

Having considered our legislation, we are next to examine the general rules of construction of similar statutes. In

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Smith's Commentaries on Statutes, &c., sec. 544, it is laid down, (says a note to Cobb on slavery, page 91,) that, "if, from a view of the whole statute, the intention of the legislature to include slaves is manifest, they will be considered as included in the word *person*." He cited also, *State vs. Edmund*, 4 Dev., 340. Again, says Nisbet, J. in *Neal vs. Farmer*, 9 Geo., 599: "Experience has proved what theory would have demonstrated, that masters and slaves cannot be governed by the same laws. So different in position, in rights, in duties, they cannot be the subjects of a common system of laws."

Says Mr. Cobb, in his valuable treatise on slavery, sec. 94: "Hence the conclusion, that statutory enactments never extend to or include the slave, neither to protect nor to *render him responsible, unless* specifically named or included by necessary implication."

Again, in section 302, he adds: "The result is, that the ordinary penal code of a slaveholding State does not cover offences committed by slaves, and the penalties thereby prescribed cannot be inflicted upon them." * * * *
"Every slaveholding State has, hence, found it necessary to adopt a slave code, defining the offences of which a slave may be guilty, and affixing the appropriate penalties therefor."

With these general rules for a guide, let us turn to the act creating the offence upon which this indictment is founded, and see from a view of the whole statute whether there is a manifest intention of the legislature to include and make slaves responsible under it. If such had been their intention, it would have been easy to have made it manifest by a direct provision, instead of leaving it to a far-fetched inference. The legislature were creating a new offence against the morals of the community; if they had intended that slaves should be indicted under it, they certainly would have made the usual provisions in the punishment, to wit:

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that if the offender is a slave, he shall be punished by corporeal punishment, but if a white man, then by fine and imprisonment.

Instead of this, they fix a punishment which to the slave is no punishment at all, because he has no means, nor can he have, of paying a fine, nor has he any liberty of which to be deprived. At the time of the passage of this act, the policy of the State legislation was clearly manifest and established, to-wit: in keeping up the distinction between free persons and slaves, in separate codes, and in providing different punishments.

The fact that there is no appearance of an intention to separate the punishments in this act is, in our opinion, an evidence the legislature did not intend to include and make slaves responsible.

We do not think the legislature intended including this class of persons, because as an additional reason, the offence is one a slave cannot in the nature of his situation commit. In the first place he is not permitted by our laws or by our institutions to have the charge, control, or management of any house, booth, tent, shelter, or other place in which he could keep, have, exercise, or maintain a gaming table, or procure, suffer or permit any person to play for money or other valuable thing. He is under the control of his master; he has no disposable will over any house, booth, tent, shelter, or other place. He is in such place by the will of his master, who is responsible if he, with the knowledge of his master, abuses and makes unlawful use of the place. In this case the Barber Shop was the shop of the master. If he permits his slave to act as a public barber, the slave is his agent. The slave has no control or management thereof, that is not under the master.

Secondly. The slave has not the right of private property; he is entirely deprived of it from the nature of the relation that exists between him and his master. His person and his *time*

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being entirely the *property* of his master, whatever he may accumulate by his own labor, or is otherwise acquired by him, becomes immediately the property of his master.

In the case of *Brandon et al. vs. Planter's and Merchant's Bank of Huntsville*, 1 Stewart's Rep., 320, the court per Saffold, Justice, say—"Our slaves can do nothing in their own right, can hold no property; can neither buy, sell, barter nor dispose of anything without express permission from the master or overseer; so that everything they can do or possess is, in legal contemplation, *on the authority of the master.*" *Bynum vs. Boswick*, 4 Dess. 266.

The legislative enactments of our State prohibit the slave from acquiring or holding property, and from being and living alone and without being under the charge of some white person. The same may be said of a slave playing and betting at any gaming table, or in any gambling house, &c. He cannot, he has nothing to bet with; the money is not his, and if he should lose, his master could claim it; if he won, his winnings belong to his master. Thus we think it is not in the nature of things that the slave could commit the offence laid in the indictment, unless the statute expressly enacts such acts of theirs shall be offence against the law.

Where our legislation does not specify how far slaves and free persons of color are within its provisions, it is a difficult task to determine under statute offences against morals whether such persons can commit the offences or not.

The only rule to govern us is the peculiar relation they bear in society and towards their superiors.

Thus our general code provides and creates the offence of adultery and fornication, and like the act under consideration, does not discriminate between white persons and negroes. Yet no one would think of indicting a slave for such an offence, and why? Because they are not supposed to be within the act creating the offence.

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Nor would any one think of indicting a slave for passing counterfeit money, and why? because they cannot own any money, and if they passed it, the benefit derived belongs to the master.

From a view of the whole statute, the legislation of our State, and the circumstances not rendering the offence com-mitable by a slave, we are of the opinion the legislature did not intend to include slaves within this provision of the act.

It is urged with some force and propriety that this conduct of slaves is a crying evil; if so, the remedy is with the legislature. It is much better for the master, the slave, and the community at large that provisions be made for the summary punishment of slaves for such offences before a Justice of the Peace, than that the slave be dignified and brought into court with the same importance with the white man, and the master in consequence thereof put to heavy expense in employing counsel and protecting his slave.

Per curiam. Let the judgment of the court below be arrested and the defendant discharged.

EDWARD BROUGHTON, APPELLANT, VS. JOSEPH CROSBY,
APPELLEE.

1. It is not error in the Circuit Court to refuse to order a plaintiff to read on the trial depositions taken by him, though said depositions are on file and have been opened.
2. The *defendant may* read such depositions as testimony on his own behalf, if he desires it.

This case was decided at Marianna.

Appeal from Escambia Circuit Court.

The appellee instituted an action of *indebitatus assumpsit* against the appellant in the court below.

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The defendant pleaded *non-assumpsit* and payment. A trial was had and a verdict rendered in favor of the plaintiff for one thousand dollars, on which judgment was entered.

At the trial the defendant moved the court to order the plaintiff to read to the jury the depositions of witnesses taken by him, which motion was refused and the defendant excepted.

D. Jordan and McClellan & Barnes for appellant.

R. L. Campbell for appellee.

DUPONT, C. J., delivered the opinion of the court.

The only error assigned in this case is that “the court erred in not ordering the plaintiff below to read the depositions taken by him, on the trial.” We think it very clear that the court would have no more right to order a plaintiff to read on the trial deposition taken by him, though crossed by defendant and on file and opened by plaintiff, than it would have to order him to examine a witness whom he had brought into court by subpoena. The defendant would have the right to read such a deposition as testimony on his own behalf, or to examine such a witness as his own, but certainly he would have no right to compel the plaintiff to read the one or to introduce and examine the other.

Counsel for appellee moves for damages as in case of a frivolous appeal, but as it has not been made to “appear to us that this appeal has been taken merely for delay,” (Thompson’s Dig., 449,) damages are refused.

Let the judgment of the court below be affirmed with costs.

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FRANCES WOODFIN AND WILLIAM AND JOHN WOODFIN, MINORS, BY THEIR NEXT FRIEND, BENJ. D. FINDLEY, APPELLANTS, VS. ADAM MCNEALY, EXECUTOR OF WILLIAM MCNEALY, DECEASED, AND NELSON O. J. STALEY, APPELLEES.

1. Property devised in trust, after payment of debts, is assets in the hands of an administrator, with the will annexed, for which the sureties on his bond are liable.
2. The trustee cannot get possession of such property, except through the administrator, and therefore, may sue him and his sureties for it; and such suit may be brought without any order having been made by the Judge of Probate.

This case was decided at Marianna.

Appeal from Jackson Circuit Court.

For a statement of the facts as presented by the record, reference is made to the opinion of the court.

Anderson & Milton for appellants.

McClellan & Barnes for appellees.

WALKER, J., delivered the opinion of the Court.

Complainants filed their bill against defendants as sureties on the administration bond of M. H. Woodfin for account and delivery to them of what they are entitled to under the will of John Woodfin, deceased. There is a stipulation on file, that no objection is to be urged by defendants on the ground that the administrator is not made a party.

The allegations of the bill are that John Woodfin died in Jackson county, Florida, on 20th May, 1858, possessed of property amounting to near six thousand dollars, leaving the complainant Frances, as his widow, and the complainants William and John, and another son by the name of Memucan H. Woodfin, as his sole heirs at law.

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That said John Woodfin, by his last will, disposed of all his property as follows:

“All my worldly effects I wish disposed of as follows, namely: Five hundred dollars, that I regard as belonging to my son, Memucan H. Woodfin, left as his portion of capital on a final winding up and closing of our mercantile business at Pulaski, Tennessee, *to be paid over to him*; also I wish him to have, as his portion of my estate, a note I hold on A. Oliver and Wesley Howard, of Giles county, Tennessee, for one thousand dollars, (\$1,000) due Jan. 1, 1854.

“All the balance of my means, as well real as personal, I wish *to remain together for the common support* of my dear wife Frances and minor children William and John Woodfin, *so long as my wife shall remain single*.

“But in the event of a second *marriage*, she, my wife Frances, is to have one-third of all the property *then remaining*, and thus held *in common*, and the two boys William and John, one-third each, and they to have a *guardian appointed* to take care of their portion, see to their support, education, &c.

“Also, in the event of the *death* of my wife, the property so held *in common*, shall be equally divided between my two sons, William and John Woodfin.

“In the event of the *death* of either of my minor children, William and John, before his *marriage*, it is my wish that the surviving one should inherit his brother's portion.

“Also in the event of the death of the surviving one before his *marriage*, then his portion I wish equally divided between my son M. H. Woodfin and my wife Frances.

“It is also my wish that my wife Frances have power, (with the advice and approbation of M. H. Woodfin, and the Judge of Probate,) to dispose of any of the servants, in the event the same may seem to her and them for the

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interest of the family, and that she have power to make a title and good conveyance to the same.

“Also, I wish her, the said Frances, to have power to transfer any checks made payable to me, by endorsement or otherwise.”

The bill further states that no executor was named in said will, and that it was duly proved and recorded in the Probate office of Jackson county, on the 7th July, 1853, and that the said M. H. Woodfin was then and there appointed, by said court, administrator, with said will annexed, and that the defendant Staley, and the testator of defendant, McNealy, then and there executed with the same Memucan, the following administrator's bond:

“State of Florida, Jackson county: Know all men by these presents, that we, Memucan H. Woodfin, William McNeally, and N. O. J. Staley, are held and firmly bound unto Thos. Brown, the Governor of the State and his successors in office, in the just and full sum of ten thousand dollars, for the true payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents. Signed with our hands, and sealed with our seals, this 7th July, 1853, and in the 78th year of the independence of the United States of America. The condition of the foregoing obligation is such, that if the above bound M. H. Woodfin, administrator *with the will annexed* of all and singular, the goods and chattels, rights and credits of John Woodfin, late of said county, deceased, do make or cause to be made a true and perfect *inventory* of all and singular the goods, chattels, rights and credits of the said deceased, which have or *shall come* to the *hand, possession, or knowledge of him*, the said M. H. Woodfin, or into the *hands of any person or persons for him*, and the same so made do cause to be filed in the office of the Judge of Probate for the county of Jackson, at or before the expiration of sixty days next

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ensuing, and all the goods and chattels, rights and credits of the said deceased, which at any time after shall come to the hands or possession of said M. H. Woodfin, or into the hands or possession of any other person for him, do well and truly administer, and further make or cause to be made a true and just account of his administration *when required*, and all the rest and residue of said goods, chattels, rights and credits which shall be *remaining* upon said administrator's account, the same being *examined and allowed by the Judge of Probate* of Jackson county, and shall *deliver and pay to such person* or persons respectively, as the said court by their order or decree, *pursuant to the intent and meaning of the statute in such cases*, shall appoint and direct, then this obligation to be void and of no effect, otherwise to remain in full force and virtue.

[Signed.]

M. H. WOODFIN,
WM. MCNEALY,
N. O. J. STALEY.

Approved July, 1853.

FREDERICK R. PITTMAN, Judge of Probate, Jackson Co.

The bill further states that soon after the death of said testator, certain persons were duly appointed to appraise, *and make an inventory* of the estate, and that said appraisers, on or about 26th July, 1853, appraised *all of said property which was produced to them by the said Memucan Woodfin*, and made *inventory* of the same, which was deposited in the office of the Judge of Probate, and a copy of which is exhibited with the bill, showing the amount of the appraisement to be \$5,225.28. The bills states further that soon after the appointment and qualification of said M. H. Woodfin as administrator, and by *virtue thereof*, he possessed himself of the personal estate and effects of the said testator *to a large amount and value* and greatly more than sufficient to pay the just debts and funeral expenses, exclusive of the said sum of five hundred dollars, and the said note for one

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thousand dollars, which were the entire amount bequeathed to said administrator. That the estate consisted principally of household and kitchen furniture, horses, wagons, buggies, two slaves, many promissory notes, checks and other evidences of debt.

That complainants have frequently applied to said Memucan to come to a full and true account of the estate of said testator, and to pay them respectively their shares of the residue of said estate remaining in his hands, after paying all of the just debts and funeral expenses of said testator, with which reasonable and just request the said Memucan H. Woodfin refused to comply.

That though more than five years have elapsed since the said Memucan H. Woodfin took upon himself the burden of the execution of said will, and though by the laws of this State it was his duty to have settled his administration accounts before the Judge of Probate of Jackson county, yet he has failed and refused so to do.

That said Memucan H. Woodfin, administrator as aforesaid, and the complainant Frances Woodfin, on the 7th day of July, 1853, petitioned the Judge of Probate of Jackson county to grant the said M. H. Woodfin authority to sell a slave belonging to said testator, by the name of Watt, and in accordance with the prayer of said petition, the said Judge of Probate on the 22d day of August, 1853, granted an order authorizing said M. H. Woodfin *as such administrator*, to sell said slave Watt for cash, at either public or private sale, and that said M. H. Woodfin on or about Sept. 2, 1853, sold said slave Watt at private sale to J. T. Myrick for the sum of eight hundred dollars, as complainants are informed and believe, which sum of money he appropriated to his own use; and that he also sold all the balance of the property of said testator mentioned in said inventory, the proceeds of which he has applied to his own use except a small amount for the payment of debts, and the sum of five hundred and

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forty dollars paid to complainant Frances Woodfin on or about December 1st, 1853. That the checks were not endorsed by the said Frances, but were collected by said administrator and applied to his own use. That the property sold for much more than it was appraised at. That the three shares of factory stock mentioned in the inventory were sold by said Memucan for \$380, on or about June 1st, 1856; that he sold the negro girl Ellen, in Columbus, Georgia, in January, 1854, and that said Frances in no way assented to said sale. That William McNealy is dead, and the defendant Adam McNealy is his only qualified executor, and is possessed of abundant means of the estate of said William to pay the demands of complainants; that complainants have repeatedly applied to defendants to pay them what is due them, but that defendants have always refused to do so, or to come to an account; that the debts against the estate were only about \$200, and that said M. H. W. as administrator, received the sum of \$5,800.

That the sale of Watt was without authority of law, the sale having been private, &c., and that the sale of Ellen and transfer of checks were also illegal, and that defendants are liable therefor, and that it is the duty of defendants to perform the administration bond, &c.

The prayer of the bill is, that defendants be decreed to account and pay over to complainants whatever may be found to be due from said estate.

To this bill the defendants demur on the ground,
1st. That Frances Woodfin was by the will made trustee for all the property named in the will except the legacies to M. H. Woodfin, and that said property therefore did not constitute assets in the hands of the administrator.

2d. Because the note of hand and checks, and shares of factory stock being made and executed by parties who then resided and still do, and always have resided beyond the jurisdiction of this court and out of the State of Florida, are

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not constituted assets with which said bond can be made chargeable.

3d. Because the conditions of the bond upon which the suit is founded are not in conformity with the provisions of the statute in such cases.

4th. Because there was no order to the administrator to pay over, as the bond in its conditions stipulated.

The court below ruled that the demurrer be sustained and that the bill be dismissed, from which ruling the complainants appealed to this court.

We are of opinion that the first ground assumed in the demurrer is clearly bad. It is true that Frances Woodfin was Trustee, by the will, for the property coming to her and her two infant children. She was to hold it together for the common support of herself and infant children, but that surely constitutes no reason why the administrator should appropriate the whole of it to his own use, and deprive both her and them of it altogether. A trustee cannot get possession of the property devised to him or her in trust, except through the administrator with the will annexed where there is no executor, and doubtless the chief object in requiring this administrator to give bond was to secure to said Frances the delivery of the property so devised in trust. Nor do we think there is any validity in the second ground of demurrer. Promissory notes and checks, and shares of stock, although the person owing the notes may reside abroad, or the bank on which the checks are drawn, or the factory in which shares exist, may be in another State, are certainly assets in the hands of the administrator here, if he realizes the money on them, as the administrator appears to have done here. Certificates of stock may be sold here just as well as where the factory happens to be. The notes may have been negotiated here, and the money raised on them as well as where the makers reside; and no one ever thinks of going to Philadelphia or New York, or New Orleans, to

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collect checks drawn on either of those places. But even if he had gone to any one or all of those places to get the money, still it was assets for which he was liable on his bond.

The third ground of demurrer we likewise hold bad.—The condition of the bond seems to us to be in conformity with the statutes.

The condition of the bond seems to cover the whole duty, of the administrator with the will annexed; it is, that he shall file an inventory, &c., and further make or cause to be made a true and just account of his administration when required; and all the rest and residue of said goods, chattels rights and credits which shall be found remaining upon said administrator's account, the same being first examined and allowed by the Probate Court of the county where the administration is granted, *and shall deliver and pay* to such person or persons respectively as the said court by their order or decree, pursuant to the true intent and meaning of this act shall appoint and *direct*, &c. We understand that the meaning of this is, that after he has paid off all the debts he is to distribute under *the order of the court*. If there is a will, of course the court will order him to distribute according to the provisions of the will; if there is no will, then according to the provisions of the statute. But in either case he is to make a final disposition of the property of the estate under the order of the court; and it is frequently much more important that he should distribute under the order of the court when there is a will than when there is not, for the provisions of the statute are plain and he is not likely to make a mistake, but the provisions of the will are not always so.

The fourth ground of demurrer is that no order was obtained from the probate Court directing the administrator to pay over (as is contained in the conditions of the bond,) previous to the filing of the bill.

We do not think that this ground of demurrer is well ta-

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ken. The statute requires the administrator to make *annual settlement*, and limits the time for a *final settlement* to two years after the grant of administration. The bond also provides that he shall make a true and just account of his administration when required, and “to pay to such person or persons respectively, as the court by their order or decree, pursuant to the true intent and meaning of this act shall appoint and direct.” Now the bill expressly alleges that the administrator was requested and urged by the complainants to come to an account and settlement of the estate, but that he *refused so to do*. How could the Court of Probate make any *order to pay over*, unless the accounts were before him? and who was to exhibit the accounts if the administrator did not? We think the counsel for the defendants has misconceived the design and meaning of this condition of the bond. It is evidently intended for the protection of the administrator when he may be in doubt as to the proper parties who are entitled to receive the estate. It never was intended to be a *condition precedent* to calling the administrator to account.

In conclusion, we may remark, that however the law may be as to the necessity of first fixing the amount of indebtedness against the administrator before proceeding against the sureties, we understand the stipulation entered into by the defendants and filed with the record to dispense with any requisition of that kind, and that they are to become the accounting parties, provided the bond is binding upon them.

It is therefore ordered and adjudged that the decree of the chancellor rendered on the ——day of ——185—, whereby it was adjudged that the bill filed in this case should be dismissed, be reversed and set aside with costs, and that the cause be remanded to the court below with directions that the defendants have leave to answer and to take such further proceedings therein as may be conformable to equity.

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WILLIAM B. GAINES, PLAINTIFF IN ERROR, VS. FORCHEIMER & BROTHERS, DEFENDANTS IN ERROR.

1. A verdict will not be set aside as against evidence, where there has been evidence on both sides, and no rule of law violated, nor manifest injustice done although there may appear to have been a PREPONDERANCE of evidence against the verdict.
2. As a *general rule*, if the finding of the jury be clearly against law, the verdict will be set aside and a new trial granted.

This case was decided at Marianna.

Writ of error to Santa Rosa Circuit Court.

The appellees instituted suit in the court below against the appellant on a promissory note for three hundred dollars, dated 15th of June, 1850. A mortgage was given to secure the payment of the note, which was filed with the note, and on which was endorsed a credit for eighty-eight 90-100 dollars on the 16th June, 1850. The defendant pleaded first, payment in full, second, set off.

The record contains the following copy of a receipt given by the defendants in error to the plaintiff in error, for certain notes described, viz:

Received from Wm. B. Gaines, Esq., three notes, as follows: one for \$100 30-100, drawn by J. O. Carroll at three months from Feb. 11th, 1852, and two due bills, drawn in favor of Wm. Carns, by J. O. Carroll, on 13th January, for eleven dollars, and the other 22d January, (both on demand) for seven dollars.

E. FORCHEIMER & CO.,

E. DENNIS.

The deposition of Edward Dennis, a witness examined by defendant, is embraced in the record, in which the witness states that he was on several occasions present when settlements or arrangements took place between the parties

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to this suit in reference to a mortgage given to plaintiffs in connexion with matters of general account, but remembers none in which the mortgage was exclusively the object of settlement or arrangement. On these occasions payments were made by defendant and by plaintiffs admitted to have been received, but precisely what sums or amounts, or what the particular application of them, he is unable to state, without reference to the books of plaintiffs. Could not say positively whether the precise sum of one hundred dollars was on either of these occasions or on any occasion paid by defendant to plaintiffs, or by them or either of them admitted to have been paid by defendant, either on the mortgage or on general account. His impression was, there was a payment of one hundred dollars made by defendant and acknowledged by plaintiffs, which may have been intended to be applied upon account of the mortgage, but has no distinct recollection of plaintiff or either of them acknowledging such an application of it. Could not distinguish the payment made on account of the mortgage and those on general account, but is confident that the payments made amounted altogether to as much as five hundred dollars. In the spring of 1852 defendant gave to plaintiffs notes of John O. Carroll and others in connection with the payments made to plaintiffs, but does not recollect that these notes were given in payment or that they were taken otherwise than as collateral. Witness as book-keeper of plaintiffs and on their behalf, gave defendant a receipt for them, but cannot say whether they were on solvent persons, or that they were taken in preference to others.

On cross-examination, the witness testified that he could not say when the payments were made—they ranged between September, 1851, and September, 1852. Could not give the dates of any payment, or say which, if any amount, still remains unpaid. Does not remember any understanding in reference to the notes of Carroll, more than already

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stated. His inference was that when taken, those notes were considered doubtful.

At the trial, a verdict was rendered for plaintiffs for \$111 10, and at the same term of court a motion was made by defendant for a new trial, on the ground of newly discovered evidence, supported by his affidavit, which motion was granted by the Court. At the following term the case was, on motion of defendant, continued, and at the succeeding term a trial was again had, and a verdict rendered in favor of the plaintiffs, for the sum of \$181 91-100. A new trial was again asked for, on the following grounds, viz: First, because the verdict is contrary to the weight of evidence; second, because the verdict is contrary to the law as laid down and admitted by the court.

The court refused the motion for a new trial, and defendant took his writ of error.

The record does not show what the charge of the court to the jury was, or that any other testimony was offered in the case.

C. W. Jones for plaintiff in error.

J. M. Landrum for defendants in error.

DUPONT, C. J., delivered the opinion of the court.

The appellees brought suit in the Circuit Court of Santa Rosa county, against the appellant, a maker of a promissory note. The defence was payment and set off. Upon the trial, the jury gave a verdict for the plaintiff, for the sum of \$111 10-100. At the same term of the court, the defendant moved for a new trial, supported by affidavit, on the ground of newly discovered evidence, which was granted by the court and the cause continued to the next term. At the ensuing term, the cause was again continued on the showing of the defendant, and at the following term, a trial was

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had and the jury returned a verdict in favor of the plaintiffs, for the sum of \$181 91-00. The defendant again moved for a new trial, on the grounds that the verdict was contrary to the weight of evidence, and that it was contrary to the law as laid down by the Court. This motion for a second new trial was refused by the court, and from that ruling, the appeal was taken and is now brought to this court for our adjudication.

We have carefully examined the record in this case, and can discover no good reason for disturbing the verdict of the jury. With reference to the first ground of error assigned, to-wit: that the verdict was contrary to the weight of evidence, it is well settled that the verdict will not be set aside as against evidence, where there has been evidence on both sides, and no rule of law violated, nor manifest injustice done, although there may appear to have been a *preponderance* of evidence against the verdict. (1 Grah. and Wat. on N. T., 380.)

In reviewing the testimony in the case, we are clearly of opinion that instead of the preponderance having been against the verdict, it was clearly in its favor. The verdict seems to have allowed to the defendant full credit for the payment that had been made on the note; and as to the receipt for notes and due bills, given by the plaintiffs to the defendant, we think the jury were correct in not regarding it as evidence in the case, there being nothing on its face to show the application to be made of the proceeds when collected, and a total failure in the evidence going to prove any responsibility on the same, over to the defendant.

We are at a loss to discover any ground for the second error assigned, to wit: that "the verdict was against the law, *as laid down by the Court.*" There is nothing in the bill of exceptions to show *how* the Judge below laid down the law, and even if there were, we are satisfied that the verdict violated no principle of law. We recognize the

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general rule that if the finding of the jury be clearly against law, the verdict will be set aside and a new trial granted, (1 Grah. and Wat. on N. T., 327,) but such is not the position of the verdict in this case, and we therefore overrule the assignment. It is therefore *ordered* that the judgment of the court below be *affirmed* with costs.

WILLIAM JUDGE, PLAINTIFF IN ERROR, VS. JOHN S. MOORE,
DEFENDANT IN ERROR.

1. When demurrer to plea is sustained, with leave to defendant to plead over and he does plead over, he cannot assign the sustaining of the demurrer as error.
2. It is the duty of parties before they go into trial to see that the pleadings are made up, and when they go willingly before the jury, they must, unless the contrary plainly appears, be considered as having waived all demurrers undisposed of, and all pleas, replications, &c., on which the issues are not joined.
3. It is not error for the court to refuse an instruction not applicable to the issue joined or the evidence in the case.
4. It is not error to refuse a new trial for the purpose of enabling a party to procure testimony to impeach a witness.

This case was decided at Marianna.

Appeal from Santa Rosa Circuit Court.

On the 26th Sept. 1855, Moore brought an action of assumpsit against Judge on a promissory note, of which the following is a copy, viz:

On or before the first day of January next, I promise to pay John S. Moore or bearer, three hundred dollars, value received. January 23, 1854.

WM. JUDGE.

Defendant pleaded, first, failure of consideration, in this, that the said promissory note was given for the hire of two negroes, named Henry and Randall, for the year 1853, and

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that by the act and conduct of the plaintiff, he, the defendant, was deprived of the work and labor of the slave named Randall, for about ten months of that year, the plaintiff retaining the possession for that time. Second, partial failure of consideration on the same ground. Third, payment in full of the note sued on. Fourth, as follows, viz:

“The said defendant, by Jordan and Chain, his attorneys, comes and defends the wrong and injury, when, &c., and says that the plaintiff ought not to have or maintain his aforesaid action against him, because he says the said plaintiff on the day of A. D. 1853, contracted with said defendant, as follows, to-wit: that he, the said plaintiff, would let the said defendant have the possession of and work and labor of two certain negro men slaves, one by the name of Henry and the other by the name of Randall, the property of said plaintiff, for the term of twelve months from and after the date aforesaid, and for the price of three hundred dollars, payable on the first day of January next, ensuing the date aforesaid, and take the note of said defendant for the amount aforesaid, and in consideration thereof the said defendant executed and delivered to the said plaintiff the said promissory note, mentioned and described in the declaration of said plaintiff, for the possession of and the work and labor of the said negro men slaves; and the said defendant avers that the said plaintiff violated and rescinded said contract, by taking back the possession of and receiving the work and labor of the said man slave, Randall, for and during the time which he the said plaintiff had agreed to hire said slave to said defendant, except about two months of the time, thereby rescinding and making null and void said contract for which said promissory note set out and particularly mentioned in the said declaration of the said plaintiff was given, and this he is ready to verify—therefore he prays judgment whether the said plaintiff ought to have or maintain his aforesaid action against him.”

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The plaintiff demurred to the first and second pleas and joined issue on the third and fourth.

The demurrer being sustained, leave was granted to plead over, whereupon the defendant pleaded—first, that the slave Randall, for the hire of whom, with a slave named Henry, the note sued on was given, ran away after being in defendant's possession two months, and went back to the plaintiff, who retained him in his service for the balance of the year, without the consent or procurement of defendant.

Second, partial failure of consideration on the same ground.

Third, that on the first day of January, eighteen hundred and fifty-five, he paid to the plaintiff one hundred and fifty dollars, which was to have been credited on said note.

Fourth, set-off.

On the 6th December, 1858, the plaintiff filed his demurrer to the first amended plea, and replied to the second that defendant had impleaded the plaintiff in the Circuit Court of the State of Alabama, for the identical keeping of the slave Randall, in the said second plea specified, and recovered a judgment against the plaintiff for the sum of one hundred and forty dollars and fifty cents. To this replication defendant demurred. The record does not disclose that these demurrers were disposed of, nor that there was any reply to the third and fourth amended pleas.

On the 23d December, 1858, a trial was had and the jury having returned a verdict for \$371 62, judgment was entered thereon.

A motion was afterwards made for a new trial on the following grounds:

1. That the verdict does not respond to all the issues joined.
2. That the verdict is contrary to law.
3. That the verdict is contrary to evidence.
4. That it is contrary to the weight of evidence.

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5. Upon the ground of surprise as to the testimony of Bass.

6. Upon the ground of newly discovered evidence.

7. That the verdict was contrary to the charge of the court.

The motion for a new trial was refused.

[The copy of the record furnished the reporter contains no bill of exceptions giving a history of the trial of the case, the evidence offered, the charge of the court to the jury and the grounds on which the motion for a new trial was overruled.]

Jordan & Chain, Yonge, McClellan & Barnes for plaintiff in error.

James M. Landrum for defendant in error.

WALKER, J., delivered the opinion of the court.

This was an action of assumpsit brought in the Circuit Court for Santa Rosa county, on 26th Sept., 1855, on a promissory note, dated January 23, 1854, of which the following is a copy:

“On or before the first day of January next, I promise to pay John S. Moore or bearer, three hundred dollars, value received.

[Signed.]

WM. JUDGE.”

Defendant pleaded, *first*, that said note was given for the hire of two negro slaves, named Henry and Randall, for the year 1853, and that the consideration thereof had entirely failed by reason of the plaintiff having deprived the defendant of the services of one of said slaves for about ten months of said year.

Secondly, a partial failure of consideration; *thirdly*, payment; *fourthly*, that plaintiff nullified and rescinded said

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contract of hiring by taking Randall back and keeping him for ten months of said year.

Plaintiff demurred to the first and second pleas and joined issue on the third and fourth. On June 11th, 1858, the demurrer was sustained and leave given to plead over. Afterwards, but when we do not know, as the dates are not given in the record, the defendant pleaded over by filing the following amended pleas, viz: *First*, that the slave Randall ran away and went back to the plaintiff, who retained him in his service for all said year, except two months, without the consent or procurement of defendant. *Second*, that the consideration partially failed by reason of the facts aforesaid. *Third*, that on January 1, 1855, defendant paid plaintiff one hundred and fifty dollars on said note. *Fourth*, set-off.

On Dec. 6th, 1858, plaintiff demurred to the *first* amended plea and replied to the *second* amended plea that defendant had sued him in Alabama for taking Randall back and keeping him, and had recovered therefor \$148 50.

To this replication the defendant demurred. There was no judgment of the court on this demurrer, nor on the demurrer to the first amended plea; nor was there any replication or demurrer filed to *third* and *fourth* amended pleas.

In this condition of the pleadings, the parties went to trial, and on December 23, 1858, the jury gave a verdict to plaintiff for \$371 62, and judgment was entered accordingly. On Dec. 31, 1858, a new trial was asked for and refused. Defendant then filed a bill of exceptions and brought the case to this court by writ of error.

The *first* error assigned is waived by the written endorsement of defendant's counsel and therefore we will not notice it.

The *second* error assigned is that the court erred in sustaining the demurrer to the first and second pleas first

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pleaded and granting leave to plead over. If the defendant had excepted to this ruling of the court and refused to plead over, he might now assign it as error, but having availed himself of the leave granted of pleading over, he thereby waived his right of making said assignment. *Mitchell vs. Chaires*, 2 Fla., 18; *Mitchell vs. Cotten*, 2 Fla., 138; *Ellison Adm. vs. Allen*, 8 Fla., 206.

The *third* error assigned is, that “the court erred in having the jury sworn and rendering final judgment against defendant while demurrer to the first amended plea and the demurrer to the replication to the second amended plea remained open and undisposed of.” We think this error is not well assigned. It was the duty of the parties before they went into the trial to see that the pleadings were made up. To hold this as error would be to allow the defendant to take advantage of his own negligence. When the parties went willingly before the jury, they must be considered, unless the contrary plainly appears, as having waived all demurrers undisposed of and all pleas, replications, &c., on which issue was not joined. See *Taylor vs. Baker*, 1 Fla., 255.

The fourth error assigned is, that “the court erred in having the jury sworn when there was no issue to try, the first amended plea being demurred to, and the replication to the second amended plea being demurred to and not disposed of, and there being no issue joined on the plea of partial payment nor the plea of set-off.”

This error seems to be assigned through mistake. There were *two* issues for the jury to try, viz: On the third plea, being the plea of payment, and on the fourth plea, which is in the following words, to-wit:

“The said defendant by Jordan & Chain, his attorneys, comes and defends the wrong, and injury, when, &c., and says that the plaintiff ought not to have or maintain his aforesaid action against him, because he says that the said plaintiff

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on the day of 1853, contracted with said defendant as follows, to-wit: That the said plaintiff would let the said defendant have the possession of and work and labor of two certain negro men slaves, one by the name of Henry and the other by the name of Randall, the property of said plaintiff, for the term of twelve months from and after the date aforesaid, and for the price of three hundred dollars, payable on the first day of January next, ensuing the date aforesaid, and take the note of said defendant for the amount aforesaid, and in consideration thereof, the said defendant executed and delivered to said plaintiff the said promissory note mentioned and described in the declaration of the said plaintiff, for the possession and work and labor of said negro men slaves. And said defendant avers that said plaintiff *violated* and *rescinded* said contract by taking back to his possession and receiving the work and labor of the said man slave Randall, for and during the time which he the said plaintiff agreed to hire said slave to said defendant, except about two months, of the time, thereby *rescinding* and *making null and void* said contract, for which said promissory note set out and particularly mentioned in said declaration of said plaintiff was given, and this he is ready to verify, &c.”

On these two issues, of payment and rescision, the defendant thought proper to take his chances before the jury, and it is too late for him, after the jury has found those issues against him, to complain before this court that there were other pleadings in the case not made up.

The *fifth* error assigned is, that “the court erred in sustaining the objection raised by the counsel for the plaintiff when the counsel for the defendant attempted to prove by the witness Henry Whitworth, the commands and instructions given by the wife of plaintiff to said slave Randall, as averred and set out in the *first* and *second* pleas of defendant.”

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It is a sufficient answer to this assignment to say that there were no issues joined on said first and second pleas, and therefore the court was right in excluding all evidence concerning matters stated in them.

The sixth error assigned is that "the court erred in charging the jury and in not giving the charge asked for by the defendant."

The charge asked for by the defendant was "that if the jury are satisfied from the evidence that one of the negroes was taken back by the plaintiff even with the consent of the defendant, the plaintiff would not be entitled to recover the full amount of the hire of the two negroes."

We are of opinion that the court was right in refusing this instruction, because, first, the only issues in the case were, first payment, and secondly a total rescision of the contract, under neither of which was such a charge proper, and secondly because there was no evidence on which to base it.

The evidence is that the boy Randall ran away from defendant and went back to plaintiff, and that plaintiff, on demand of defendant, delivered him up, and that said boy ran away again and went back to plaintiff, who thereupon *proposed* to defendant to take said boy back and allow a credit of \$150 on the note, but that defendant *refused* this offer, saying that he would sue plaintiff for damages. One of the witnesses also testified that defendant stated that he would not bring said negro back, though he admitted that plaintiff would deliver him up if he, defendant, would take him back; that the defendant had got rid of a bad bargain, as Randall was a bad negro, &c. It would seem from the evidence that the plaintiff was willing to deliver the boy Randall up to the defendant or else to keep him and allow a credit on the note of \$150, but that the defendant would not assent to either proposition, but elected to have his

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action for damages. Having made this election, we think the court was right in holding him to it.

The *seventh* assignment is that “the court erred in not granting a new trial as moved for by the counsel for the defendant.”

Various grounds were alleged for a new trial, but as we have in the preceding parts of this opinion disposed of them all except that of surprise, we will speak now only of that. On the application for a new trial the defendant made affidavit that Everett Bogs, one of the witnesses for plaintiff, had also been a witness for defendant in a suit which defendant had previously brought against plaintiff in Alabama, for converting wrongfully the slave Randall to his own use before the term of hiring had expired, and that on said trial the said witness had sworn very differently from what he did on this trial, and that defendant was thereby surprised and had discovered only since this trial that he could prove that said witness swore differently on the former trial, &c. The record states that “the court overruled the motion and refused to grant a new trial upon the ground that the rule requires that the party asking for a new trial upon the ground of surprise, must not only show surprise, but must also show that he is injured thereby, and also how he will remedy the difficulty that has been occasioned by the surprise, and that newly discovered evidence to impeach a witness is not ground for a new trial.”

We hold that the court did not err in thus ruling, and we are also of opinion that said affidavit, instead of showing that defendant was entitled on the merits to a new trial, shows conclusively that he was not, for it shows that defendant had already sued plaintiff, as he had said he would do, to recover whatever damages plaintiff had occasioned him by his conduct in regard to the boy Randall, and therefore he ought not to have set up the same matter as a defence to plaintiff's suit on the note.

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Per curiam. Let the judgment of the court below be affirmed with costs.

BARNARD KENDIG, FOR USE OF H. N. GOULD, PLAINTIFF IN
ERROR, VS. THOMAS GILES, DEFENDANT IN ERROR.

1. In suits brought in the name of A for the use of B, the nominal plaintiff is A; the *real* plaintiff is the person for whose use it is instituted.
2. The assignee can only bring suit in the name of the nominal plaintiff, where there is a legal assignment of the right of action, and by such assignment a *right* to use the name of the assignor. Where in such suits the declaration does not disclose a legal assignment in the real plaintiff, of the right of action it will be held bad on demurrer thereto.
3. A right of action on a warranty of soundness contained in a bill of sale of a slave (said warranty not containing a promise to the *assigns* or order of the purchaser or to bearer,) is not negotiable by assignment either at common law by the statute of Ann, or by the act of the Legislature of this State, so as to vest in the assignee a right of action on the warranty, in a suit at *common law*.

This case was decided at Marianna.

This was an action of assumpsit, upon warrant of soundness of slave sold by said Giles to the said Kendig, tried in the Circuit Court of the county of Santa Rosa. The court in the declaration relied upon is in the following words, viz:

“SANTA ROSA COUNTY, TO WIT: Barnard Kendig, (the plaintiff in this suit,) who sues for the use of H. N. Gould, by Jordan and Chain, his attorneys, complains of Thomas Giles, the defendant in this suit, who has been summoned to answer the said plaintiff of a plea of trespass on the case in assumpsit. For that whereas, on the fifth day of May, in the year of our Lord one thousand eight hundred and fifty-eight, at Santa Rosa county, in consideration that the said plain-

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tiff, at the special instance and request of the said defendant would buy of the said defendant a certain negro man named Bill, a slave for life, at and for a certain price or sum of money, to wit: the sum of eight hundred and fifty dollars, to be therefor paid by the said plaintiff, he, the said defendant undertook, then and there faithfully promised the said plaintiff that the said negro was sound in body and mind and a slave for life; and the said plaintiff avers that he, confiding in the said promise and undertaking of the said defendant, did afterwards, to wit, on the day and year aforesaid, buy the said negro, a slave, of the said defendant, and then and there paid him for the same the sum of money, and thereupon the said defendant executed and delivered to the plaintiff, together with the said negro, a bill of sale for said negro, in the words and figures following, viz:

\$850.

MORILE, May 5th, 1858.

“Received of Barnard Kendig, eight hundred and fifty dollars in full payment for a negro man named Bill, aged about twenty-three years, which slave I hereby warrant sound in body and mind, and a slave for life; and I also hereby warrant the title of said slave

THOMAS GILES.

Witness: A. H. ROULSTON.

“And which is hereby shown to the court. Nevertheless the said defendant contriving and fraudulently intending to injure the said plaintiff, did not perform or regard his said promise and undertaking so by him made as aforesaid, on his aforesaid bill of sale, but thereby craftily and subtly in this, to wit: that the said negro slave at the time of making of said promise and undertaking of the said defendant was not sound in body and mind, but on the contrary thereof, was at that time unsound in body and mind, and was of no use or value to the said plaintiff, and he the said plaintiff has been put to great charges and expenses in em-

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ploying physicians to prescribe for and nurse and attend said negro slave, and in loss of his services and labor, in the whole amounting to eight hundred and fifty dollars, to wit, at Santa Rosa as aforesaid.”

It appears by the record, that the said bill of sale has on the back thereof the following transfer, viz:

“For the sum of one dollar to me in hand paid by H. N. Gould, at and before the signing of this bill of sale, I do hereby transfer all my right and title to the within slave Bill.

B. KENDIG.

To this declaration, the defendant filed the following demurrer:

“And the said defendant says that the said declaration is not sufficient in law and assigns the following cause therefor:

“This suit is brought in the name of Barnard Kendig, for the use of Gould, instead of the name of Barnard Kendig alone.”

Joinder in demurrer is filed, and the court below sustained the demurrer and ordered the suit dismissed. In the rendition of said judgment it is alleged there is error:

The error assigned is, “That the court erred in sustaining the demurrer to the plaintiff’s declaration.”

Jordan & Chain for plaintiff in error.

McWhorter for defendant in error.

FORWARD, J., delivered the opinion of the court.

It is contended by the plaintiff in error that it is immaterial for whose benefit or use the suit is brought, if the plaintiff has a legal right or cause of action. This leads us to determine who is the real plaintiff to this suit, and the nature of a suit brought for the use of another. In this

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suit, as in all suits brought for the use of another, the person in whose name the suit is brought for the use of another is but the *nominal* plaintiff—the *real* plaintiff is the person for whose use it is instituted; he brings the suit in the name of the nominal plaintiff, *by virtue of a right to use his name*, and if he recovers, the proceeds go to him—consequently he controls the suit and he may discharge it. The nominal plaintiff has no control or management of the suit.

It is clearly settled that any release by an assignor of his assignee's claims is a nullity. 9 Cowen, 34; 3 Johnson, 426.

The real plaintiff in this suit being the said H. N. Gould, the question arises under the facts disclosed in the declaration, whether the court will recognize in Gould, the present holder of said bill of sale containing said warranty, the right to use the name of said Kendig, the nominal plaintiff. This can only be where there is a legal assignment.

No privity or connexion is AT LAW created between the said Kendig and said Gould, unless there is a legal assignment of said warrant so as to entitle the said Gould to hold the proceeds to his own use if he recovered.

It will be seen by reference to the warrant in said bill of sale, that it is not made to the *assigns* of said Kendig; it is a warranty to said Kendig, and being a personal warranty, does not pass with the slave. The said Kendig had in said bill of sale a title to said negro; in addition to the title he had the right to maintain an action for a breach of warranty for any unsoundness that may have existed at the time of the purchase from said Giles. Could he make an assignment of this right to maintain an action, that would be recognized in a court of law? He and Gould, his assignee, cannot both sue said Giles on his warranty. A mere right to sue is not assignable at common law, so as to vest the legal title in the assignee; nor is the right to sue on this

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warranty negotiable under the provisions of the statute of Ann, because the warranty is not made to the order or assigns of said Kendig or to bearer. It contains no negotiable words; 3 Kent, 77. This warranty not being assignable at common law nor under the statute of Ann, we are to look at the statute of this State, to see whether it is made assignable by its provisions.

Our statute of 1828, (see Thompson's Digest, page 348) provides: "It shall not be necessary for any person who sues upon any bond, note, covenant, deed, bill of exchange or other writing, whereby money is promised or secured to be paid, to prove the execution of said bond, note, covenant, deed, bill of exchange or other writing, unless the same shall be denied by the defendant under oath."

"The assignment or endorsement of any of the *fore-mentioned* instruments of writing shall vest the assignee or endorsee thereof with the same rights, powers, and capacities as might have been possessed by the assignor or endorser."

This right to maintain an action for a breach of warranty is neither a bond, note, covenant, deed, bill of exchange nor other writing *whereby money is promised to be paid*; it gives only a right of action, which may or may not be maintained. In warranties of this kind, damages constitute the gist of the action; soundness or unsoundness is the issue. If the negro was unsound, the right of action accrued to the said Barnard Kendig, although he may have parted with the slave and the title to the slave. 1 Henry Blackstone, 17; 1 Dunford & East, 136; 2 Dunford & East, 745; 1 Taunton, 368. In construing this act we think it was not the intention of the Legislature to include within its provisions such an instrument as this, and make it *negotiable*.

Such was the construction given by the Supreme Court of Georgia, in the case of Broughton vs. Badgett, 1 Kelly's Reports, page 77, to a similar statute in that State.

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Whether the said Kendig intended to assign to the said Gould his right of action on said warranty or not, we do not decide, nor whether, if said intent should be established, a Court of Equity might not take jurisdiction in the name of the real party.

We hold that a *court of law* will not recognize the right of said Gould under this instrument of writing to use the name of said Barnard Kendig, therefore the court below committed no error in sustaining the demurrer to the declaration.

Per curiam. Let the judgment be affirmed with costs.

L. H. KNIGHT, ADMINISTRATOR OF S. S. KNIGHT, DECEASED,
APPELLANT, VS. GEORGE W. KNIGHT, APPELLEE.

1. An executor or administrator under the proviso of the 24th section of the Act regulating judicial proceedings, approved Nov. 23, 1828; may deny the signature of his testator or intestate to any bond, note, or other instrument purporting to have been signed by him, and also plead a want or failure of consideration by plea put in without being sworn to, and after the cause is called on the appearance docket, on giving reasonable notice, and the effect of such plea will be the same as at Common Law, that is, to require the plaintiff to prove the signature, and the defendant to prove the want or failure of consideration.
2. If the executor or administrator desires to throw the onus of proving the consideration on the plaintiff, he must put in his pleas under oath before the cause is called on the appearance docket.

This case was decided at Tallahassee.

Appeal from Leon Circuit Court.

The opinion of the Court, to which reference is made, contains a statement of the facts presented in the record.

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Gwynn & Hilton for appellant.

M. D. Papy and *J. B. Galbraith* for appellee.

WALKER, J., delivered the opinion of the court.

This was an action of assumpsit, brought to the Spring Term, 1859, of Leon Circuit Court, to recover the amount of a promissory note, of which the following is a copy:

TALLAHASSEE, FLA., Sept. 10, 1856.

\$2,000—One day after date, I promise to pay to Geo. W. Knight two thousand dollars, at 6 per cent. interest, from date, value received.

[Signed]

S. S. KNIGHT.

The declaration is the usual form. No pleas were filed at the appearance term, and on 23d March, 1859, the case was continued.

On the 3d day of June, of that year, Gwynn & Hilton for defendant, gave notice to Galbraith, for plaintiff, of their intention to file the following pleas, to-wit:

1st. That the promissory note on which said suit was brought was not signed and executed by said Spottswood S. Knight.

2d. That there was an entire failure of consideration for said note.

3d. That the consideration for which said note was given, (if any consideration there ever was therefor) wholly failed.

4th. That the consideration for which said note was given (if any consideration there ever was therefor) partially failed.

On the 6th of August, 1859, pleas were filed in accordance with the foregoing notice. The plaintiff below did not demur to any of them, nor take exception to the time at which they were filed, but joined issue and went to trial on 21st Oct., 1859. Evidence having been submitted on both sides as to the genuineness of the signature, and also as to the

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consideration, and the case having been argued by counsel, the jury found a verdict for plaintiff and the court gave judgment accordingly. The defendant then moved for a new trial, which was refused, and the defendant appealed to this court.

It appears from the bill of exceptions filed in this case, that at the trial in the court below the court instructed the jury as follows, to-wit:

“This is an action brought for the purpose of recovering the amount of the promissory note exhibited in evidence. In this case the defendant filed the following pleas: 1st, that defendant did not make the note; 2d, that there was no consideration for the note; 3d, that the consideration has failed; 4th, that the consideration has partially failed.”

“In the case before you the onus of proof is on the defendant. It is incumbent on him to prove by evidence that the signature on the note is not the signature of S. S. Knight, or that there was no consideration for the note, or if there was that the consideration had wholly or partially failed.

“In the absence of such proof on the part of defendant, the note itself is evidence, both of the signature and consideration. In other words, the jury are bound to believe that the signature is genuine, and that there was a consideration for it which has neither wholly nor partially failed, unless the defendant proves, by evidence, that the signature is not genuine or that there was no consideration, or if there was that it has wholly or partially failed.”

“1. If the jury believe from the evidence, that the signature on the note is not the genuine signature of S. S. Knight, or that there was no consideration for the note, or if there was, it has failed, they will find for the defendant.

“2. If the jury believe the signature genuine, and that there was a consideration for the note which has not failed they will find for the plaintiff.”

To these instructions of the court the defendant by his

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counsel excepted, and the grounds of error now assigned in this court are: 1st, that the court below erred in giving the instruction aforesaid, and, 2d, that the court erred in refusing to grant a new trial.

The decision of the question whether the court below did or did not err in giving said instructions depends on the proper construction of our act of 1828, "regulating judicial proceedings." The 23d and 24th sections of this act read as follows:

"SEC. 23. *Be it further enacted*, That no plea in abatement or other dilatory plea, or any plea denying the signature to any bond, note or other instrument of writing, shall be received by either of said courts, unless the same be put in on oath and filed before the cause is called upon the appearance docket.

"SEC. 24. *Be it further enacted*, That all promissory notes and other instruments of writing not under seal, shall have the same force and effect as bonds and instruments under seal; and it shall not be necessary for the plaintiff to prove the execution of any bond, note, or other instrument of writing purporting to have been signed by the defendant, nor the consideration for which the same was given, unless the same shall be denied by plea put in and filed as aforesaid; Provided, that nothing in this act shall prevent an executor or administrator from denying the execution aforesaid or from pleading a want or failure of consideration, if he shall give in writing reasonable notice of such intention to the plaintiff, his agent or attorney."

The general rule prescribed by the 23d section prevents a plea by a defendant in his own right, denying the signature, from being *received* after the cause is called on the appearance docket, and the 24th section says that it shall not be necessary for the plaintiff to prove either the execution or the *consideration*, unless the plea be put in and filed as aforesaid; but then, seeing the difficulty in which an

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executor to administrator would be placed, the *proviso* is added “that nothing in this act shall prevent an executor or administrator from denying the execution aforesaid or pleading a want or failure of consideration, if he shall give in writing reasonable notice to the plaintiff, his agent or attorney.”

To give “reasonable notice” therefore is the only condition imposed on an executor or administrator to secure to himself the right of having his plea to the signature *received*, and without being sworn to, after the cause is called on the appearance docket. A defendant in his own right is not compelled to give any notice, because he is required to file his plea at the first term and the plaintiff must take notice of it at his peril; but an executor or administrator is required to give reasonable notice, because he is not so compelled and therefore justice to the plaintiff requires it.

This *proviso* also allows the executor or administrator to plead to the consideration after the first term on giving reasonable notice. The law presumes that he is not as well advised as other defendants as to his defences, and therefore allows him a greater length of time to prepare them.

But whilst the *proviso* gives to an executor or administrator the right to file pleas to the signature, not under oath, after the appearance term, and also pleas to the consideration on giving reasonable notice, it is silent as to what effect and operation such pleas shall have, and being silent, we are driven, in our opinion, to the common law for a solution of that question. It is true that the act of 1822, introducing the common law into the territory, was left out of the Condensation Act, which was passed on the 23d Nov., 1828, and approved on the same day, and thereby repealed, but we find on examination that an “act regulating judicial proceedings” was passed on the 21st, though not approved till the 23d, Nov., 1828, and therefore being passed

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when the common law was in force, must be considered with reference to its provisions.

In 1829 the Common Law was again introduced, but even if it had not been and if the act repealing the act introducing it had been passed before our judiciary act, still we concur with Douglas, C. J., in *White vs. Camp*, 1 Fla. R. 94, that it cannot be supposed that the Legislature acted without any regard to its wise and salutary provisions.

By the Common Law, where plea is filed, the onus of proving the signature to a promissory note is on the plaintiff, but the burden of proving a want or failure of consideration is on the defendant, and so we think the proviso to this statute leaves it in both instances, unless indeed the executor or administrator will avail himself of the privilege awarded to every other defendant, of pleading under oath before the cause is called on the appearance docket.

We express no opinion as to whether the court erred in refusing to grant a new trial on the evidence; but it is not necessary to a decision of this cause and other evidence may be produced at the second trial.

Our conclusion is that the court below erred in so much of its charge to the jury as instructed them that the onus of proving the signature was on the defendant, and inasmuch as the jury may have been misled thereby, there being conflicting testimony on that point, it is ordered that the judgment of the court below be reversed, and that this cause be remanded for a new trial in conformity with this opinion.

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MARY THOMAS AND OTHERS, MINORS, &C., BY THEIR NEXT FRIEND, APPELLANTS, VS. JAMES WILLIAMS AND MATILDA WILLIAMS, HIS WIFE, GUARDIANS, &C., APPELLEES.

1. A father can appoint a guardian for his children during any part of the infancy of the child, "by deed in writing or last will and testament," as prescribed by the act of 1828, (Thomp. Digest, 225,) but such appointment *only* gives "*power* over the child," and *not* over the *property* of the minor.
2. Under the statute of 12 Charles 2d c. 26, sections 8 and 9, fathers were authorized to appoint guardians for their children, who should have power over the person of the child, and the custody and management of the estate of the minor; but our statute of 1828, is inconsistent with the statute of Charles, and restrains the custody, care and management of the guardian appointed by deed or will to the *person* of the child.
3. A person appointed guardian by deed or will of the father, may be guardian both of the person and estate of the minor, but as guardian of the *person*, he derives his appointment from the father, and of the property by authority from the court authorized to grant it.
4. An infant may, by his *prochein ami*, call his guardian to an account.
5. A Court of Chancery will permit a stranger to come in and complain of the guardian, and abuse of the infant's estate.
6. The statute authorizing the father to appoint a guardian of his child, does not contemplate their giving a bond.
7. If a person appointed guardian, pursuant to our statute, abuses the trust, by doing anything prejudicial either to the person of the infant or his estate, the Court of Chancery, where the Probate Court refuses or neglects so to do, may, upon proper application, either remove him and appoint another guardian, or else impose such terms on him, by obliging him to give security, &c., as will effectually hinder him from doing anything prejudicial to the infant.

This case was decided at Marianna.

Appeal from Calhoun Circuit Court.

The opinion of the Court contains a statement of the facts to which reference is made.

McClellan & Barnes for appellants.

A. H. Bush for appellees.

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FORWARD, J., delivered the opinion of the Court.

Mary Thomas, John F. O. Thomas, Nathaniel Thomas and Margaret Thomas, minor children of John F. O. Thomas, deceased, by their next friend, Luke Lott and Ann M. Lott, his wife, bring their bill of complaint against James and Matilda Williams, setting forth, among other things, that the father of said minor children, John F. O. Thomas, in his life time, became seized and possessed of certain property, under and by virtue of the will of Jonathan Thomas, his father, who directed in said will, that the said property should be held in trust by the executors of his will, (or some other person legally appointed for that special purpose), for the exclusive support and maintenance of his son, John F. O. Thomas and his family, for and during his natural life, and at his death to be equally divided between the lawful heirs of said John F. O. Thomas, for their own use and behoof forever.

The bill further states that, Banks Meacham, executor of the will of Jonathan Thomas, in the execution of said will *turned said* negroes, Peter and Fishey, with her increase, as named in said bequest, over to the said John F. O. Thomas in his life time.

The bill further states that the said John F. O. Thomas, the father of complainants, departed this life on the 8th February, 1859, having the said negroes in his possession at his death, leaving said complainants and Benoni Thomas, who is of age, his lawful children.

It is further alleged in said bill that the said John F. O. Thomas, the father of said complainants and of said Benoni, before his death, executed and delivered to the said James and Matilda Williams a "paper writing," of which the following is a copy:

"STATE OF FLORIDA, CALHOUN COUNTY:—Know all men by these presents, that I, John F. O. Thomas, of the

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county and State aforesaid, do nominate, constitute and appoint James Williams and Matilda Williams as my true friends in trust, and at my death to take my four children, Mary Margaret, John F. O., Nathaniel and Margaret Elizabeth, and to take care of them, and also to take their property in trust, and to support my children and educate them until they become of age, so as to act for themselves, and also to be appointed their guardian in any and all capacities, to support and to obtain any property that may belong to them or in any wise belonging to them, and also to be intrusted with all and singular the property, and children to raise and take care of, in the best manner that they can to raise them up, as though they were their own, and to protect them in the same manner as they would their own children. Witness my hand and seal, this the 10th day of December, A. D., 1858.

[Signed]

JOHN F. O. THOMAS.

“Signed, sealed and delivered in the presence of L. B. McKinney, John C. Taylor.”

The bill further alleges that under and by virtue of this paper writing the said James and Matilda Williams claim to be the guardian of the persons and property of the complainants, and have proceeded to take charge of the same without giving any guardian bond as the law directs shall be done.

The bill further sets forth the said John F. O. Thomas, at his death, owned a small property, and that letters of administration have been granted on his estate to Benoni Thomas, the brother of complainants, and he has taken upon himself the administration of the same.

It is further stated that after the death of the father of the complainants, the Judge of Probate of Calhoun county appointed three indifferent persons to value and divide said negroes, derived under the will of the grandfather, between the said complainants and their brother, the said Benoni

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Thomas, that they proceeded to do so, and did divide them; to Benoni, they allotted *three* negroes, and to the complainants they set apart in common *nine* negroes.

The bill further states, that said nine negroes thus allotted to the complainants are now in the possession and control of the said James and Matilda Williams, they claiming to hold said negroes as the guardian of your complainants under the said appointment contained in said deed in writing, and without giving any guardian bond.

The bill charges that the complainants derived their said property from their grandfather, under the provisions of his will; that the said James and Matilda Williams are not entitled to the possession, custody and control of the same, without they should make and execute a good and sufficient guardian bond for the same. The complainants further charge that it is not prudent and safe for said James and Matilda Williams to hold said negro property without giving bond for the same, *and that they apprehend loss from the same being held as at present.*

The prayer of the bill is that the Court of Equity will order, adjudge and decree that the said James and Matilda Williams shall make and execute a bond as guardian in double the amount of the value of said negro property, with good and sufficient sureties, &c., and in the meantime the court will order that the Sheriff take them into his custody, for safekeeping, or that a receiver, until said bond is given, be appointed, and general prayer for further relief.

The answer of Williams and wife admits the will of Jonathan Thomas, as alleged, but insists that the effect of said will was to vest in the said John F. O. Thomas an absolute title to the property given and devised to him, and that he had full power and the legal right to dispose of the same as he might see fit, or if such was not the effect that the legal title thereof is in Banks Meacham, the trustee, named in the will, and that he should have been made a

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party to said bill. The answer further insists that the "*paper writing*" above set forth, was the last will and testament of the said John F. O. Thomas. The answer admits that they have in their charge and under their care the said minor children, and that they are in possession of said property.

The defendants insist in their answer that under and by virtue of their office of testamentary guardian of said minors, they are entitled to such care of said children, and to the possession and management of their property. The answer avers that the mother of these children died before the father, and was the niece of said Matilda Williams, and that at her request, with the sanction of the father, had much of the trouble, care and protection of said children, who are very near and dear to the defendants.

The defendants in their answer deny that the said minors desire any change, and aver that they are satisfied with the guardianship assigned them by their father. The defendants in their answer further insist, that as there is no allegation of waste or mismanagement in the bill, nor any equity in said bill not properly cognizable in a Court of Probate, that the Court of Equity had no jurisdiction, and pray to have the same benefit thereof as if they had *demurred* to the bill. The defendants further allege in their said answer, that they have been put to expense about their guardianship, and are put to expense in this suit which they claim should be paid out of the property of complainants, if said minors are taken from them. The complainants filed replication and the cause was set down for hearing on the bill and answer. Afterwards on the 4th November, 1859, the Chancellor made the following order, viz:

This cause having been fully argued and submitted on bill and answer, and the Court being advised as to its decree to be rendered herein, it is considered, ordered, adjudged and decreed, that the prayer of the complainants be

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and the same is hereby refused, and that the said bill be dismissed. From which decree an appeal is taken to this court.

It is contended by the defendants that the writing executed by said John F. O. Thomas, appointing them guardians, is the last will and testament of said Thomas, and that they are testamentary guardians.

Secondly, It is insisted that said slaves became vested in the said John F. O. Thomas in his life time, and that in and by said "paper writing," he appointed the defendants testamentary guardians of the minors and made them trustees or gave them the possession, control, and management of said property as their guardians during minority. The first question to be determined is, whether the said "paper writing" is a will or deed?

If it is a will making a bequest of *slaves* in trust, it is under our statute void so far as it makes a bequest of slaves, for not having been executed in the presence of *three* witnesses. See Thomp. Dig., page 192.

But whether an instrument be a deed or a will does not depend upon its form or manner of execution, but upon its operation. *Wilborn vs. Weaver*, 17 Geo. 267.

Let us see what the operation of this instrument would be at common law, and what it is under our statute. Upon a careful examination of the writing, it will be seen that it does not attempt to make any other disposition of the property of the minors than to authorize the guardians named being intrusted with.

As to their property it says: They, Williams and wife, are "*to be appointed their guardian in any and all capacities, to support and to obtain any property that may belong to them, or in any wise belonging to them, and also to be intrusted with all and singular the property.*" They are, however, *at the death* of said Thomas, to take his four children and take care of them, and the children to raise

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and take care of in the best manner they can; to raise them up as though they were their own, and to protect them in the same manner they would their own.

It is not an appointment of guardian over the property of the children, because it points to a guardian "to be" afterwards appointed for that purpose. The operation of the instrument then is to give the defendants *power over the children* until they become of age, which would seem testamentary in the form of a deed, and is the same in office and interest with a guardian in socage, excepting where restricted by the deed, 4 Bacon's Abrid., 563, while a testamentary guardian has the custody of the lands and goods of the infant, which the guardian has not. 4 Bac. Ab., 544.

Whether we construe this as a will or a deed, it will have the same operation under our statute of 1828, which provides that "fathers may appoint guardians for their children by deed in writing, or last will and testament, during any part of the infancy of the child, and such appointment shall give the guardian the same *power over the child*, and shall subject him to the same liability as is and shall be directed by law." Thomp. Dig., 225.

This paper is in the form of a deed, although testamentary in its character, and its execution is like that usually accompanying a deed. It is true, that according to the common law rule, as laid down in Blackstone, a deed must take effect in *presenti* and not in *futuro*. Yet our statute authorizes a father to appoint a guardian for his children by "*deed*" in writing. This provision of our statute means something, and we cannot think the Legislature intended merely the authorizing of a parent to thus convey away his natural right while he was living, to take effect in *presenti*.

In giving construction to this instrument, we think it such a deed as is authorized by the statute, and the said defendants are guardians of said children, under appointment of the father "*by deed in writing*," and as such guardians have

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power over the persons of the said minors during their minority, or until they are by proper authority, for good cause, removed.

This deed is the authorized act of the father in his life time, wherein he appoints guardians to take custody and management of the children after his death—a power of appointing similar to what was conferred on the father by English statutes, 4 and 5, P. and M., c. 8, 4 Bacon's Abridgment, 542, (Title guardian A,) and by the 12 Car. 2, c. 24, §8, *ibid.* 543.

Whether by this appointment, irrespective of the deed in writing, being guardians by statute, they have the right to the custody and management of the slaves and other personal estate of said children, is a question of some difficulty.

In England, by the 9th section of 12, of Charles the Second, c. 24, they have provided for it by enacting, "That such person or persons to whom the custody of such child or children hath been or shall be so disposed or devised, shall and may take into his or their custody, to the use of such child or children, the profits of all lands, tenements, and hereditaments of such child or children, and also the *custody, tuition and management of the goods and chattels and personal estate* of such child or children, till their respective age of one and twenty years, or any lesser time, according to such disposition aforesaid, and may bring such action or actions in relation thereto, as by law a guardian of common socage might do."

Have the provisions of this statute been adopted in this State, and the same powers given to the guardian appointed by the father, as he possessed under the English statute, or has our act of 1828 restricted those powers and confined them to the custody, care, management and tuition of the child?

Our Legislature has in this State, by act, adopted the statute laws of England, which are of a general and not of

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a local nature, down to the 4th day of July, 1776; provided the said statute be not inconsistent with the Constitution and laws of the United States and the Legislative acts of Florida. (See Thomp. Digest, 21.)

Thus at the passage of the act of 1828, in which fathers are authorized to appoint guardians, this 9th section of 12 Charles was in force here.

Had the Legislature authorized fathers to appoint guardians for their children by deed in writing or last will and testament during any part of the infancy of the child, and stopped there, then there can be no doubt but that under the 9th section of the statute of Charles such guardian would have had the same power as they possessed under the English statute, but it goes on and declares, *such appointment shall give the guardian the same powers over the child as is and shall be directed by law.* They restricted the power to that *over the child*, by not making any provisions that they should have power *over the property* of the child, thereby making the provisions of the statute of Charles inconsistent with our act. Mr. Reeves in his treatise on domestic relations, page 311, says: "It often happens that one person is guardian of the person, and another of the estate of the minor, and often the same person is guardian of them both."

Taking into consideration what the law was under the English statute in force in this State at the time of the passage of the above act of 1828, we think, from its peculiar wording, the Legislature intended that one person should be guardian of the person and another of the estate of the minor; and if one person is guardian of both, he, in such cases as the one under consideration, derives one by appointment of the father, the other by appointment of the court. A similar construction has been given to the statute in Georgia. *Poe Admr. vs. Schley*, 16 Geo. 364.

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Taking this view of our statute, it becomes unnecessary for us to enquire whether the legal title of these slaves is vested in the trustee named in the will of Jonathan Thomas, or whether Benoni Thomas, the administrator of the estate of John F. O. Thomas, is entitled to possession of them. In fact, this could not be determined under this bill, because neither Banks Meacham nor Benoni Thomas, are parties thereto. Nor does it appear how or upon whose application the Judge of Probate ordered a partition or allotment of the negroes. Having decided the defendants are only guardians, having power over the persons of the minors and not over their property, we are now to consider whether the court erred in denying the prayer of the bill and dismissing it. There is no doubt that an infant may, by his *prochien ami* call his guardian to an account, and a Court of Chancery will permit a stranger to come in and complain of the guardian and abuse of the infant's estate. *Fulton vs. Rosevell*, 1 Paige 178, *Earl of Pomfret vs. Lord Windsor*, 2 Ves. 484, 2 *Vernon*, 342, 1 P. W. 119. And it seems that if a person appointed guardian pursuant to our statute abuses the trust by doing anything prejudicial either to the person of the infant or his estate, the Court of Chancery may either remove him and appoint another guardian, or else impose such terms on him by obliging him to give security, &c., as will effectually hinder him from doing anything prejudicial to the infant. *Beaufort vs. Berty*, 1 P. W., 706, *Roach vs. Garver*, 1 Ves. 160, 1 John chy, 99.

It is not alleged in the bill filed in this case that the defendants are abusing their trust or doing anything prejudicial, either to the person of the minors or their estate, nor does this appear by any evidence.

The bill charges it is not prudent and safe for them to hold said negro property without giving bond, and that they apprehend loss from the same being held as at present, but there is no evidence to show the unsafety of the property,

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or that there are grounds for apprehending a loss. If any one desires there should be a guardian of the property of the minors with bond, he should apply to the Judge of Probate for letters of guardianship. The whole tenor of the prayer of the bill is, that bond should be required of the guardians. Our statute does not contemplate their giving a bond, and there being no evidence to show that said defendants, as such guardians, are doing anything prejudicial either to the person of the minors or their estate, it would be beyond all precedent to require they should give bond and security. (See *Eyre vs. Countess of Shaftesbury*, 2 P. Wms. 107.)

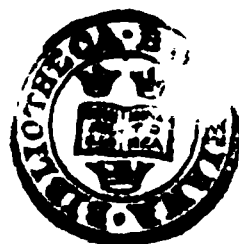
We therefore think the court below did not err in dismissing the bill. The decree is affirmed with costs.

**CALVIN J. JOHNSON, APPELLANT, VS. THE PENSACOLA AND
GEORGIA RAILROAD COMPANY, APPELLEES.**

1. The principle of law which will not allow the terms of a written contract to be varied by parol evidence, is as applicable to subscription for railway stock as to any other written contract.
2. The acceptance by the Pensacola and Georgia Railroad Company of the provisions of the act of 6th January, 1855, to provide for and encourage a liberal system of internal improvements in this State, did not materially alter or change the original charter of said Railroad Company.
3. Nor did such acceptance materially enlarge or diminish the power conferred by the original charter upon the board of directors of said company to locate the route and fix the terminal points of the road.
4. The power conferred by the original charter upon the board of directors to locate the road and fix the terminus thereof on the boundary line between the States of Florida and Georgia is not infringed by the act of 15th December, 1855, amendatory of the original act of incorporation of the Pensacola and Georgia Railroad.

This case was decided at Tallahassee.

Appeal from Leon Circuit Court.



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This was an action of assumpsit, instituted to recover the installments of stock subscribed for by Johnson, the appellant. The defendant pleaded non-assumpsit, upon which issue was joined, and under this plea it was agreed that all substantial defences should be admissible.

The following bill of exceptions appearing in the record, gives a statement of the evidence offered at the trial and the instructions of the court:

The counsel for the plaintiff to maintain and prove the issue on his part, offered in evidence the first subscription list to the Pensacola and Georgia Railroad, on which appeared the name of the defendant as a subscriber. It was admitted that the calls had been regularly made, and here the plaintiff closed.

The defendant's counsel to maintain the issue on his part, offered Gen. R. A. Shine as a witness, who proved that he himself had subscribed for shares in the same Railroad, to the amount of one hundred thousand dollars. The defendant offered to prove by the witness the inducements and circumstances which led to the subscription to the Railroad, at the time of the first subscription, which was objected to and the objection sustained, to which ruling of the court herein the defendant by his counsel excepted.

Witness was then asked what was the understanding of the subscribers when they subscribed, which was objected to, and the objection sustained by the court, to which counsel for defendant excepted.

Witness was then asked to what point the road was being constructed, which was ruled to be a proper question, and witness proved that it was in course of construction to Alligator, not on the Georgia line; that he is a director in said company, and that there has been no survey of any road to the Georgia line and no action taken by the Company having for its object the running of the road from Alligator or any other point to the Georgia line, and that

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when he and Johnson first subscribed, it was to a road to be constructed to the Georgia line; that he, witness, and many other large subscribers were released from their original subscription for stock after the acceptance of the provisions of the Internal Improvement Act by the Company, which acceptance was proved.

The defendant then offered in evidence the minutes of the Company, and the acceptance of the act of 1855, together with the charter of said Company and the act amendatory thereof, which minutes so offered without objection as follows:

“Tallahassee, November 28, 1853. *Resolved*, That correspondence be forthwith opened with the Corporation and citizens of Savannah and Albany Railroad Company, to inform them that this Board is fully organized and is prepared to discuss all matters of mutual interest to the two companies, as well in regard to the proper point at which their contemplated branch road should enter Florida in view of extending it to Pensacola, under the charter granted in this State, as also to ascertain what provision they propose to make, either by subscription of stock in this company or in any other way, for the completion of this road from the point of junction to its western terminus, over and above the sum of \$800,000 pledged to be subscribed in Florida or above any larger sum that may be so subscribed, it being apparent that the work will require an addition of two million of dollars.

“2. *Resolved*, That immediate correspondence be opened with the Atlantic and Gulf Central Railroad Company in order to secure harmony of action in application to Congress, for a grant of public lands contiguous to the respective road and in order to bring the subject before that body early in the session. And by this correspondence, this board desires to express the deep interest it feels to harmonize with these companies in regard to their Eastern or Atlantic terminus in our

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own State, and in the location of the lines of road extending westward and southward from such terminus in view to a junction with this road in the most favorable manner, for the purpose of ultimately binding all sections of the State by an extensive Railroad system.

“4. *Resolved*, That the Apalachicola Lnad Company being large landed proprietors in the neighborhood of the contemplated road, should be invited to subscribe liberally to its stock or urged to aid in its construction by a grant of land in view of the greatly enhanced value it would confer on their lands generally.

“And it is further ordered that the large subscription made on the 8th of October last, in the subscription book at Tallahassee, by Richard Hayward, R. A. Shine, Benj. F. Whitner, John C. McGhee, Ed. Houston, D. C. Wilson and Edwd. Bradford, for themselves and their associates, are exempted from the payment of the instalment now called in, as stipulated and provided for at the meeting of the stockholders, and are therefore not liable to be forfeited.”

TALLAHASSEE, Jan. 11, 1854.

“A letter was read from A. S. Baldwin, President of the Atlantic and Gulf Central Railroad Company, containing resolutions adopted by that Company on the subject of a connection with this, and an exposition or agreement against our proposed junction with a road from Savannah, and in favor of our asking a repeal of our charter, a transfer of our subscriptions to that of the Central Road, and of making the St. Johns, i. e., Jacksonville, the Atlantic terminus. After due deliberation the board was unanimously of opinion that these resolutions and agreements present no sufficient inducement or reason for changing our present plan, while we still desire to cultivate harmony and good understanding with the A. and G. C. and Florida Railroad Companies, and believe there will be no serious difficulty, if there is a mutual desire among the parties.”

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TALLAHASSEE, 10th Feb. 1855.

“It was agreed to postpone a full organization of the Board by the election of permanent officers until the 11th April next. The Secretary was instructed to notify the Trustees of the Internal Improvement Fund of the full acceptance by this Company of the provisions of the act to provide for and encourage a liberal system of Internal Improvements in this State, approved 6th January, 1855, and to specify the route lying between Pensacola or the waters of Pensacola Bay and the point of intersection with the Florida Railroad on the most direct practical line to Jacksonville, (with a view to an extension afterwards to the Georgia line) as that over which this Company propose to construct its road, which notice is in conformity with the two first resolutions at the recent stockholders’ meeting.”

TALLAHASSEE, Oct. 18, 1855.

“The President stated that the object for calling a meeting of the Board at this time was to consider and act on the report of the Engineers, who have been engaged in making surveys of various routes for a Railroad from Tallahassee to the town of Alligator, in the county of Columbia. It was expected that the reports, estimates, &c., would be ready to be submitted to the Board.”

“The P. & Ga. Railroad Company, if they be compelled to seek a terminus on the Georgia line east of the terminus now contemplated in Hamilton county, may use any part of the Atlantic and Gulf Central Company as part of the road of the Pensacola and Georgia Company to the Georgia line. And in like manner the Atlantic and Gulf Central Company may use any part of the road of the Pensacola and Georgia Railroad Company which may intervene between roads on the main line constructed by the Atlantic and Gulf Railroad Company.”

“If, when the Pensacola and Georgia Railroad Company shall have constructed their road to Alligator, the other

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Company shall not have constructed theirs to that point, the former company shall be at liberty to construct eastward to the Florida Road, or to a junction with the road from Jacksonville west, and in the latter event the connection at the point of meeting shall be made on the same terms as provided for a connection at Alligator. And if any part of the work from Alligator eastwardly shall have been performed, the Pensacola and Georgia Railroad Company may adopt that work as part of their road, they paying therefor the stock of their company to the amount of the cost of the work. And the Atlantic and Gulf Central Railroad Company, if the other Company do not construct their road to Alligator by the time the Atlantic and Gulf Central Railroad Company shall have constructed theirs to that point, to be at liberty to construct westwardly until they connect with the road of the Pensacola and Georgia Railroad Company, and a connexion at such point of meeting shall be established on the same terms as provided for a connexion at or near Alligator.

“Fifth, passengers, freight and cars of each company shall pass over each road with the same facilities as if the whole road had been constructed by one company. And passengers, freight and cars on the road to the Georgia line coming south to the main line from Jacksonville to Pensacola Bay, whether going east or west after reaching said main line, or passengers, freight and cars passing from any point on the main line from Jacksonville to Pensacola Bay and going up the road to the Georgia line, shall pass with the same facilities as if they shall continue on the main line from Jacksonville to Pensacola Bay.

“The two companies shall unite in asking the General Assembly to ratify and confirm the agreement which shall be made between them by proper amendments to their respective charters, in such manner as to give effect to their agreement.”

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“After some discussion, the report and all the foregoing specifications, except the fifth, were adopted, and it was ordered that a copy of the report and specifications and the action of this board thereon be communicated to the Fla., Atlantic and Gulf Central Railroad Company by the President of this Company.

“The President stated that he had heard officially that the Tallahassee Railroad Company have appointed a committee to meet a committee of this Board to confer together as to the terms and conditions on which a junction of the roads of the two companies can best be effected.

“A vote was then taken on the various modifications of this route, and resulted in the adoption of *line 2*, which runs from Tallahassee to or near Bailey’s, then near Captain Bailey’s and Wm. Scruggs’s, in Jefferson county, and crossing the Aucilla below Sandy Ford, passes through the northern part of Patterson Hammock, and leaving Madison C. H. to the north, crosses the Suwannee river near Columbus, and thence to a point near Alligator, in Columbia county.”

It was admitted that at the time of the subscription made by Johnson to the stock of the Pensacola and Georgia Railroad, whose name is on the first subscription list, that said subscription was made together with others, with a view to a connection with Georgia and to control the majority of the stock of the Pensacola and Georgia Railroad and secure a connection. Here defendant closed.

The plaintiff then called F. H. Flagg as a witness, who proved that the Pensacola and Georgia Railroad Company commenced work in the fall of 1855, and that the road is graded to the Suwannee. The same witness stated that he was Secretary and Treasurer of the Company—that the subscription sought to be recovered in this case was needed to pay indebtedness incurred in constructing the first twenty miles of the road from Tallahassee eastward; that con-

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tractors for building the road from the Suwannee river to Alligator are to be paid exclusively in lands obtained by the Company under the provisions of the Internal Improvement Act, and stock in the Company.

The subscription of the 9th May, 1855, was offered in evidence without objection. Mr. Flagg was asked by plaintiff as to the acquisitions of the Company under the act of 1856; objected to by defendant and objection sustained.

Cross examined and asked whether defendant was present at the meeting of stockholders which accepted the Internal Improvement Act. He stated that he did not know, that he never saw him, does not know that he ever assented to change in the route of the Pensacola and Georgia Railroad, from the original contemplated route, to the line of Georgia. General Shine also proved the same thing. Walter Gwynn, a witness for plaintiff testified that the Pensacola and Georgia Railroad will be entitled, under the act of Congress of 17th May, 1856, to 1,167,360 acres of land, and under the act of the Legislature of Florida, of 6th January, 1855, to 139,210 acres of State land.

“I have located, examined and appraised on the line between Tallahassee and Alligator, 363,607 84-100 acres which I have appraised at an average of about \$1 79 per acre; of this, about 200,000 acres lie in Columbia county, between the Suwannee river and Alligator, my average appraise-ment, of which is about \$2 08 per acre.

Here the testimony closes, and after argument of counsel, the counsel for the defendant moved the court to charge the jury as follows: “That the charter of the P. and Ga. Railroad Company as it existed at the time of the defendant’s subscription is as much a part of the contract as though the same had been embodied in the caption to the subscription paper, and that no material alteration, could be made in said contract by the Pensacola and Georgia Railroad Company,

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or by the defendant without the consent of both parties. *Therefore*, if the jury find that the road now in the course of construction is a different road from that set forth and contemplated in the original charter, the defendant is not bound for the installments called in, unless *the assent* to such change of route by the defendant has been proved, or if the jury find that the terminus of the present road is at a point not contemplated by the original charter, the defendant is not bound, unless *his assent* to such change is proved.

“That the charter constituted a part of the contract of subscription and that an alteration in the route of the road or in its terminus, which would defeat the original object intended by the corporation, would release the defendant if made without his consent.

“If the jury believe that from the evidence the original objects and purposes of the defendant in subscribing for the route and terminus contemplated in the original charter were materially defeated by the adoption of the present route and terminus, then he was not further bound for his subscription and they should find for the defendant.”

Which instructions were refused, and in lieu thereof the court gave the following: “The charter of the Pensacola and Georgia Railroad Company as it existed at the time of the defendant’s subscription is a part of the contract and no material alteration could be made in said contract by the Pensacola and Georgia Railroad Company or by the defendant without the consent of both parties. If, therefore, the jury believe from the evidence that the road now being constructed is a different road from that set forth in the original charter, the defendant is not bound unless he assents, or if the jury believe from the evidence that the terminus of the present road is at a point not contemplated by the original charter, the defendant is not bound unless he assents to the change.”

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The counsel for plaintiff then asked the following instructions, which were given:

“That the acceptance of the Internal Improvement Act is consistent with the purposes of the Pensacola and Georgia Railroad Company, and is auxiliary only. That the acceptance of the Pensacola and Georgia Railroad of the Internal Improvement Act was an act of the stockholders of said company, and if the charter of the company is violated by said acceptance, the charter is not thereby altered but the act of acceptance is void.

“That the Pensacola and Georgia Railroad Company after the subscriptions were made, could determine its eastern terminus at any place on the Georgia line, and from time to time change its policy as to the eastern terminus. That the company was competent to stipulate for a terminus east of the Alapaha.

“That the defendant must show that he made timely objection to the acceptance of the Internal Improvement Act, and the presumption is, in the absence of proof to the contrary, that he assented to the action of the stockholders, who unanimously accepted the act. And especially is this presumption proper where the company has contracted debts to large amounts before any objection is made.”

To which instructions so given and to the rulings of the court herein, the defendant, by his counsel, excepted.

Defendant asked the following charge: “If the jury shall believe from the evidence that the Legislature or the corporation have undertaken to embark this corporator in a speculation to which he never consented, or in an enterprise to which he never gave his consent, then he is absolved from his subscription and the majority cannot bind him,” which instruction was refused.

To all of which refusals of the court to admit or allow the evidence of the defendant and the charges given for plaintiff and refusal to give the charges asked by defendant and the

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rulings of the court therein, defendant by his counsel did then and there except.

A verdict and judgment having been rendered for the plaintiff, the defendant appealed.

W. Call for appellant.

Gwynn & Hilton for appellee.

HON. J. J. Finley, Judge of the Western Circuit, who sat in this case in place of Hon. D. S. Walker, disqualified for having been of counsel for the defendant in the court below, delivered the opinion of the court.

The Pensacola and Georgia Railroad Company instituted an action of assumpsit in the Leon Circuit Court against Calvin Johnson, the plaintiff in error, for the recovery of certain calls, amounting to two hundred and fifty dollars, which were admitted by the defendant upon the trial to have been regularly made, upon his subscription for stock in said railroad.

The defendant pleaded "non-assumpsit," upon which plea issue was joined, and the parties went to trial, with the agreement and understanding that the defendant should be allowed, under the plea of the "general issue," to make any and all substantial defences which he might have.

In pursuance of said agreement, and under the said plea, certain issues of fact were submitted to the jury who were empanelled in the case, all of which issues were found against the defendant; but as their finding is not put in question by the record, it will not require the consideration of this court.

The record in this case presents only three questions for the consideration of this court, and they all arise upon exceptions taken to the rulings of the Judge on the trial in the court below. These questions are as follows, to-wit:

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1. Will parol evidence be received to prove the inducement to subscription for railway stock?

2. Was the original charter of the Pensacola and Georgia Railroad Company materially or fundamentally altered or changed by the acceptance of the Internal Improvement Act of the 6th January, A. D., 1855, or by the act of the 15th December, A. D. 1855, amendatory of the original charter of said company?

3. If such change or alteration of the original charter were made, was it necessary, in order to have entitled the plaintiff to have recovered against the defendant in action upon his stock subscription, to prove that such alteration was made with the assent of the defendant; or will such *assent* be presumed, unless the defendant should prove his *dissent*?

The first question is not made in the assignment of errors nor insisted on the argument here. This point was understood to have been abandoned by the plaintiff in error; but if by any means the court should have fallen into mistake in regard thereto, such mistake will be cured by its giving, as its opinion, as it now does, that the court below did not err in rejecting parole evidence to prove the inducement to the defendant's subscription for stock in the Pensacola and Georgia Railroad, it being an established principle of law, which is as applicable to subscriptions for railway stock as to any other written contract—that *parol evidence will not be received to vary the terms of a written contract*, unless in case of fraud, &c.

We are next to consider the effect of the acceptance of the Internal Improvement act by the Pen. and Ga. R. R. Co., and the effect of the amendatory act of the 15th December, 1855, upon the original charter, under which the defendant made his subscription for stock, and under which the said company organized.

The record shows that on the 10th day of February,

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A. D. 1855, the Board of Directors of said company accepted the provisions of the Internal Improvement Act and instructed their secretary to notify the Trustees of the Internal Improvement fund of such acceptance, and to specify the route between Pensacola or the waters of Pensacola Bay and the point of intersection with the Florida Railroad, in the most direct practical line to Jacksonville, (with a view to an extension afterwards to the Georgia line) as that over which this company proposes to construct its road.

No power was reserved to the Legislature in the original act of incorporation to alter, amend or repeal the same, and the principle which we have drawn from the current of judicial decision upon this point is, that the charter of a railroad company contains the terms of the contract between the Legislature granting it and the company incorporated under it, and also the terms of the contract between the company and the individual stockholders or corporators, and that no material or radical change or alteration can be made in the charter after a subscription for stock, so as to bind such subscriber without his consent.

We will proceed first to enquire whether such change or alteration has been made in the original charter of the Pen. and Ga. R. R. Co., by reason of its acceptance of the provisions of the Internal Improvement Act.

Is there anything contained in the Internal Improvement Act, which, being accepted by the Pen. and Ga. R. R. Co., works a material or essential alteration in the original charter of that company?

To answer and dispose of this question satisfactorily it will become necessary to examine with great care the provisions, both of the original act of incorporation and of the Internal Improvement Act, at least so far as those provisions may relate to and affect the power granted to the Board of Directors to locate the route and terminal points of the road.

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By the first section of the original charter, the Commissioners are authorized to open books and to receive subscriptions for stock in a "railroad to be constructed from the city of Pensacola, or any other point or points on the waters of Pensacola Bay in Florida, and running thence in an eastwardly direction to the western or southern boundary line of the State of Georgia."

And by the third section of the same act, it is provided, "that said railroad shall extend from the city of Pensacola, or any other point or points on the waters of Pensacola Bay, running eastwardly to some point on the boundary line between the States of Florida and Georgia, *to be determined by a majority of the Board of Directors of said company.*"

The foregoing are the only provisions in the original charter which relate to the location of the route and terminal of the road.

The power is expressly given to the Board of Directors to fix one of the terminal points of said road any where upon the waters of the Bay of Pensacola, and the other any where upon the boundary line between the States of Florida and Georgia. And we think there can be but little doubt but that the Board of Directors had the power, under the charter, at any time to alter or change its policy as to the location and terminus of the road, even without the consent of the individual stockholders, *provided* they run said road from some point on the Bay of Pensacola, in an eastwardly direction, to some point on the boundary line between the States of Florida and Georgia.

But it is insisted for the plaintiff in error, that the acceptance of the provisions of the Internal Improvement Act did work a radical and fundamental change in the original charter, in regard to the location of the road and its terminus on the Georgia line.

As to the question whether the Board of Directors did, in

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point of fact, alter or change the location of the road in a manner which was violative of the original charter, it has been definitely settled by the verdict of the jury, and cannot be enquired into by this court, for the reason heretofore stated, that the finding of the jury is not put in question by the record.

But the question presented to the court upon the record is, whether there is any provision in the Internal Improvement Act which materially alters or changes the power which the Company derived from its original charter to establish the route and to fix the terminal points of the road.

In order to ascertain this, we must examine such of the provisions of the Internal Improvement Act as bear upon the questions of the location and termini of the road.

The 4th section of the Internal Improvement Act designates as a proper improvement to be aided by the Internal Improvement fund, "a line of railroad from the St. Johns river, at Jacksonville, to the waters of Pensacola Bay," with extensions to certain points on the Gulf of Mexico, and elsewhere. And the 5th section of said act provides, that any railroads that were then organized or chartered, or which might thereafter be chartered by the Legislature, and whose routes, in whole or in part, as authorized by their own charters, should be or lie within the line so to be aided by the Internal Improvement fund, should have the right to construct that part of the said line from Jacksonville to Pensacola Bay, as might be embraced by their own charters, provided the provisions of said act should be accepted by them within the time and in the manner prescribed by said act.

It is clear that there is nothing contained in the 4th and 5th sections of the Internal Improvement Act which altered or in anywise changed the power which was conferred by

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the original charter upon the Board of Directors to determine the location and fix the terminal points of said road. For it is manifest from the plain and unequivocal language employed in the third section of the original charter, that the Legislature intended to confer upon the Board of Directors an unrestricted power to fix the terminus of said road, after leaving Pensacola Bay and running thence eastwardly, *anywhere* and at *any point* on the boundary line between the States of Florida and Georgia. And it is equally manifest that the 5th section of the Internal Improvement Act only authorized the said company to construct so much of their own road as could, by authority of its own charter, be located on the line of road designated in the 4th section of said Internal Improvement Act, as an improvement to be aided by the Internal Improvement fund.

The Internal Improvement Act simply designated an open line from Jacksonville to the Bay of Pensacola, as a line to be aided by the fund which is set apart, without granting a charter to any company or companies to construct a road upon that line, but creating and presenting very important and inviting inducements to any Railroad Companies which were then chartered, or which might thereafter be chartered by the Legislature, to locate and construct so much of their respective roads as might be authorized by their respective charters, upon the line so indicated in the 4th section of the Internal Improvement Act.

But it is contended for the plaintiff in error, that the 24th section of the Internal Improvement Act, the provisions of which were accepted by the Pen. and Ga. R. R. Co., does so essentially alter and change the original charter of said company as to impede, delay, obstruct and prevent the establishment of a terminus on the Georgia line. We are of opinion, after much consideration and careful examination of the matter, that nothing contained in the said 24th section of the Internal Improvement Act will be found,

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under a fair and just construction of the same, to invade, impair or destroy the powers conferred by the 3d section of the original charter upon the Board of Directors to locate said road, and to determine upon and fix the points of its termination.

The 24th section of the Internal Improvement Act provides “that no branch road, from the main line of Railroad provided for by this act, between the waters of Pensacola or Escambia Bay and the junction of the Florida Railroad, shall be made to the northern boundary of this State, until that part of the line between the Suwannee river and the Florida Railroad has been constructed, nor shall any such branch road be made to a point west of the Alapaha river without the consent of all the companies owning the several portions of the main line and without the approval of the trustees of the Internal Improvement fund.”

Now, it has been seen that the Board of Directors of the Pen. and Ga. R. R. Co., under its original charter, were clothed with the express and unrestricted power to locate their road from *any point* on the Pensacola Bay to *any point* on the boundary line between Florida and Georgia, and as it will appear from the record in this case, said Board of Directors did, at the time of acceptance by the stockholders of the provisions of the Internal Improvement Act, specify as the part of the line provided for in said act, and embraced in their own charter, and which they intended to construct, the line from Pensacola Bay to the point of intersection with the Florida Railroad Company in the most direct practicable line to Jacksonville, with the *expressed view to an extension afterwards to the Georgia line.*

If the original charter granted the unrestricted power to the Board of Directors to run their road to *any point* on the Georgia line, then we think it can hardly be questioned but that they had the power to extend said road

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eastwardly, the direction specified in their charter, until they should intersect the Florida Railroad.

If the Pensacola and Georgia Railroad Company had the power under its original charter to run its road eastwardly until it intersected the Florida Railroad, and did so locate the road eastwardly from Pensacola Bay so as to intersect the Florida Railroad in the most direct practicable line to Jacksonville, and so as to bring it upon the open line designated in the 4th section of the Internal Improvement Act, with a view to an extension afterwards to the Georgia line, then it will be seen that so soon as so much of the Pensacola and Georgia Railroad shall be constructed as will be necessary to effect the intersection with the Florida Railroad, that part of the line designated by the 4th section of the Internal Improvement Act and which lies between the Suwannee river and the said intersection will necessarily have been constructed and completed, so as to fully meet and satisfy all the conditions and restrictions imposed by the 24th section of said act, so that the Pen. and Ga. R. R. Co. will neither be prevented nor delayed in extending their road to such point on the Georgia line as the Board of Directors of such company may, in the exercise of the power given them in the charter, determine and establish.

Then the acceptance of the provisions of the Internal Improvement Act did not confer upon the Pen. and Ga. R. R. Co., any power in regard to the location of the road, and the fixing the termini, which it did not before possess, nor did it take away from said company any power with which it was clothed by its original charter.

It is therefore the opinion of the court, the acceptance the provisions of the Internal Improvement Act by the Pen. and Ga. Railroad Company did in no manner abridge, alter or destroy the power which it possessed under its original charter, to locate their road and to fix and establish the termini thereof.

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The Board of Directors in locating their road so as to intersect the Florida Railroad, by running eastwardly from Pensacola Bay, have not attempted to construct a road in a different direction from that authorized by its original charter, as was the case of the Middlesex Turnpike Co. vs. Lock, decided by the Supreme Court of the State of Massachusetts, and in the case of the Buffalo, Corning and New York Railroad Company vs. Pottle, decided by the Supreme Court of New York.

In selecting the route or line indicated by the 4th section of the Internal Improvement Act from Pensacola Bay to an intersection of the Florida Railroad, in the most direct practical line to Jacksonville, the Pen. and Ga. R. R. Co., only exercised a power which was conferred by its original charter.

Nor does the location of this route by the Board of Directors of the Pen. and Ga. R. R. Co., cause any extension of their line of road beyond a point originally authorized by its charter as was the case in Macedon and Bristol Plank Road Co., vs.———, decided by the Supreme Court of New York. Because here, the company are authorized to go to any point of the Georgia line, and as it appears from the record, they make their intersection with the Florida Railroad, by running in an eastwardly direction from Pensacola Bay, as specified in their charter, with the declared purpose of extending their road to the Georgia line, as they were expressly authorized by their charter to do.

Nor did the Internal Improvement Act, which was accepted by the P. & Ga. Railroad Company, authorize or require said company to enter upon a new and different enterprise from that contemplated by the original charter, as was the case in Keene vs. Johnson, decided by the Supreme Court of New Jersey, and in the case of Hester vs. The Memphis & Charleston R. R. Co., decided by the Supreme Court of Mississippi. For the enterprise in which the plaintiff in error agreed

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to participate, was the construction of a Road from the waters of Pensacola Bay to a point on the Georgia line, the location and termini to be adopted and fixed at the discretion of the Board of Directors, and the acceptance of the Internal Improvement Act does not compel the P. & Ga. Railroad Company to construct any other than a Road from the waters of Pensacola Bay to some point on the Georgia line yet to be determined by the Board of Directors, in the exercise of the power conferred by the charter.

But it is contended that the amended Act of the 15th of December, 1855, materially altered the original charter as to the location and termini of the Road.

We might here remark that there is no evidence in the record to show that the Company ever accepted the amended charter; and if not accepted by them, it could in no way affect the question now before the court. It does appear, however, in the record, that a proposition was before the Board of the P. & Ga. Railroad Company, in regard to an intersection with the Atlantic & Gulf Central Railroad Company, which might be made at Alligator, in Columbia county, or East or West of that place, according to the progress which might be made by the P. & Ga. Railroad Company to the East, and by the A. & G. C. Railroad to the West. But the record does not show with which of said Companies such proposition originated. Nor does the record show that it was ever adopted by the A. & G. C. Railroad Company. One of the resolutions adopted at the same time by the P. & Ga. Railroad Company, was to the effect that the two companies should unite in asking the Legislature to ratify and confirm the agreement which *shall* be made between them, by proper amendments to their respective charters, in such a manner as to give effect to their agreement; and it appears that the Legislature did, at its next session, amend the charter of the P. & Ga. Railroad Com-

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pany, but there is no corresponding amendment of the charter of the A. & G. C. Railroad Company.

The amended charter simply authorized the P. & Ga. Railroad Company to build an extension of their Road to a junction with the A. & G. C. Railroad at or in the vicinity of Alligator, with a provision, that if the latter Company should fail to construct its Road to Alligator by the time the P. & Ga. Railroad Company, constructed its Road to that point, then the said last mentioned Company might extend east of Alligator, or to a junction with the Florida Railroad, which, it should be remarked, is the point to which the P. & Ga. Railroad Company had already determined to go, as early as the 10th of February, 1855, and which determination had been formally notified to the Trustees of the Internal Improvement Fund.

Now admitting for the sake of argument, that such agreement had been made between the two Companies, and that the Legislature had amended both their charters, so as to ratify and confirm the agreement, and that the P. & Ga. R. R. Company had accepted the amendment which authorizes the junction with the A. & G. C. Railroad Company, we cannot see that such amendment would confer any greater power upon the P. & Ga. Railroad Company to locate its Road or fix the termini, than it had under its original charter.

Indeed the record shows, that the P. & Ga. Railroad Company had, ten months before that time, specified the route or location of their Road, as far as the junction with the Florida Railroad; and even if it had entered into an agreement with the A. & G. C. Railroad Company, by which the junction with that Road was to be made at any point West of the Florida Railroad, it would, if constructed to such junction, have necessarily completed the very line designated by the Internal Improvement Act, between the Florida Railroad and the Suwannee River, and consequently no obstacle would have been in the way of the extension

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of the P. & Ga. Railroad to the Georgia line immediately after its intersection with either the A. & G. C. Railroad or the Florida Railroad, in pursuance of the requirements of the charter of said P. & Ga. Railroad Company, and of the declared purpose of its Board of Directors.

But the record does not show that this proposition for a junction with the A. & G. C. Railroad Company was ever agreed to by said Company; and as the Legislature has passed no act amendatory of its charter, so as to ratify and confirm any agreement which may have been made between the two Companies, and as the Resolution adopted by the P. & Ga. Railroad Company simply invites a joint application for an amendment of their respective charters, to confirm and ratify—not such agreement as had been made, but as *shall* be made between them, it is rather to be presumed that no such agreement was ever made by the A. & G. C. Railroad Company.

But let the fact be as it may, the record does not show any such agreement, and the amended charter, made in pursuance of such proposed agreement, would not have materially changed or altered the original charter in respect to the power conferred by it upon the Board of Directors, for the location and terminus of the Road, as did the amended charter in the case of Winter vs. The Muscogee Railroad Company, decided by the Supreme Court of the State of Georgia.

As to the extension provided for in the amended charter to Crooked River and elsewhere, it does not appear in the record that the P. & Ga. Railroad Company ever applied for or accepted such amendment of their charter.

The mere passage by the Legislature, when the power is not reserved, of an amendment which materially affects or alters the original charter of a Railway Company, cannot bind such company until, in some authorized manner, it shall accept such amendment.

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But even supposing the amended charter had been accepted by the P. & Ga. Railroad Company, so far as it provides for a junction with the A. & G. C. Railroad, it would, as we have seen, have left the P. & Ga. Railroad Company with unimpaired power to execute, substantially, the original work and enterprise authorized by its original charter, as was the case in the Pacific Railroad Company vs. Hughes, decided by the Supreme Court of Missouri, and as was much more strongly ruled in Barret vs. The Alton & Sangamon Railroad Company, decided by the Supreme Court of the State of Illinois.

In the latter case the Legislature had authorized by an amendment, which was adopted by the Board of Directors, a change of route which was different from that *fixed* by the original charter.

As we have seen the original work authorized by the charter of the P. & Ga. Railroad Company was the construction of a Railroad from the waters of Pensacola Bay to some point on the Georgia line, to be determined by the Board of Directors. The power to execute this work, substantially, as authorized by the charter, was neither impaired nor destroyed by an agreement to form a junction with the A. & G. C. Railroad, and as we have already seen, such a junction being effected on the line already located by the P. & Ga. Railroad Company would neither have delayed nor prevented such extension.

It is, therefore, the opinion of the court, that the amended charter of the 15th of December, 1855, so far as the record in this case may show that it has been acted upon by the P. & Ga. Railroad Company, (if indeed it has been acted on at all by said Company,) does not materially alter or change the original charter of said Company, in regard to the powers conferred by such original charter upon the Board of Directors of said Company, to locate the route and ter-

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minus of said Road; and consequently does not invade the contract of subscription made by Johnson for stock in said P. & Ga. Railroad Company.

When Johnson subscribed for stock in said road, it was under the original charter, which was approved the 8th of January, A. D. 1853. Said charter did not fix the Georgia terminus of the Road, but expressly left it to be determined by the Board of Directors. In subscribing for stock in said Road, he undertook to abide by any terminus on the Georgia line, which the Board of Directors, in their discretion, might adopt.

In signing the books as a subscriber for stock in said Road, he did, in effect, sign the charter, and placed it in the hands of the Company organized under it, and said "You are authorized by me to do anything which said charter empowers you to do, and I will abide by it."

Seeing that neither the acceptance of the Internal Improvement Act by the P. & Ga. Railroad Company, nor the amended Act of the 15th of December, 1855—so far as the record may show that the Company acted under it, cannot materially or essentially alter the original charter of the said company, in regard to the location and termini of said Road; and seeing that they do not invade the contract of subscription made by Johnson for stock in said Road, it becomes wholly unnecessary to enquire as to the remaining question made by the record in this case, which is, whether to make Johnson liable in a suit for the calls upon his subscription for stock in said Road, it is necessary to prove his assent to material alterations made in the charter since his subscription was made, or whether his assent will be presumed, in the absence of proof of his dissent.

If, as we have decided, there was no material change or alteration in the charter, occasioned by the amended charter of the 15th of December, 1855, nor by the acceptance of the Internal Improvement Act, then the question of assent or dissent cannot arise.

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Taking this view of the case we see no cause for disturbing the judgment of the court below.

It is therefore ordered and adjudged that the judgment of the Circuit Court be affirmed with costs.

Decisions
OF THE
Supreme Court of Florida,
AT TERMS HELD IN 1861

MARY J. OWENS, APPELLANT, VS. SAMUEL B. LOVE AND
JAMES BRUCE, ADMINISTRATORS OF WILLIAM FORBES, DE-
CEASED, APPELLEES.

1. In this State all decrees in Chancery, whether Interlocutory or Final, are not only by the practice of our Courts, but by Statutory provision, deemed to be enrolled when entered upon the minutes of the Court.
2. A decree directing a reference to a master for the purpose of ascertaining any material fact in the case, is not a *final decree*, although it ascertains and determines all the equities of the case.
3. A Bill of Review lies only after final decree, and not upon an Interlocutory Decree. A Bill in nature of Bill of Review, is not of use in this State, as all decrees are enrolled when entered upon the minutes of the Court.
4. After an *interlocutory decree is enrolled*, the court will grant leave to file a Supplemental Bill, to bring forward newly discovered evidence, and grant a rehearing upon the same if the evidence is of such a nature, as were it a Bill of Review, would entitle the party to relief.
5. To entitle the party to relief in such cases, the newly discovered evidence must be *relevant* and material, and such as might *probably* have produced a different determination. The new matter must have first come to the knowledge of the party after the decree. The matter must not only be new, but it must be such, as the party by the use of *reasonable diligence*, could not have known; It must not be merely *cumulative* nor merely corroborative or *auxiliary* to what already in the case, but must establish a *new fact of itself*, decisive of the merits of the cause.
6. With Administrators who are strangers to the transaction, and who have to look after evidence to defend the estate the same stringency in ruling as to *knowledge* of facts, ought not be exercised.

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7. On application for leave to file a Supplement Bill, and for a re-hearing, the Appellate Court can only consider the *prior* Interlocutory Decree, so far as to ascertain and enquire whether the new matter sought to be introduced is relevant and material, and such as had the same been before the Chancellor, might probably have produced a different determination.

This case was decided at Tallahassee.

The facts of the case are fully set forth in the opinion of the court.

Papy & Archer, for Appellant.

R. B. Hilton, Samuel B. Stephens and G. K. Walker, for Appellees.

DUPONT, C. J., being disqualified to sit in this cause, having been of Counsel in the same, Hon. J. J. Finley, Judge of the Western Circuit, sat in his stead.

FORWARD, J., delivered the opinion of the court.

This is an appeal (authorized by the statute of 7th January, 1853) from an Interlocutory order of the court below, granting leave to file a Supplemental Bill to bring forward newly discovered evidence, and for a rehearing of the cause upon the newly discovered testimony, when Supplemental Bill shall be ready to be heard. The petition for rehearing, &c., sets forth in substance, as follows: That since the decree rendered on the 4th January, A. D. 1858, in this cause, authorizing the said Mary Jane Owens, to redeem the negroes in controversy, and directing an account to be taken, very important and material evidence, both of record and oral, has been discovered, which was unknown to the petitioners at the time of making said decree, "*and which has not come to their knowledge until within the last four weeks. although your petitioners were diligent in their researches, and used every means in their power to procure all the testimony relating to the defense of said suit.*" That said de-

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cree was based on the finding of the following facts in evidence, to wit: That the title of said Forbes to said negroes in said decree mentioned, was taken and held by said Forbes, only as a security for money advanced to said Mary J. Owens to enable her to quiet her title to said negroe slaves, by paying off the demand of William Teat, jr., who refused to surrender them to said Mary J. Owens, until his demand was satisfied. That said Forbes, in his life time, shortly after redeeming said slaves from said Teat, and carrying them to be placed in the possession of said Mary J. Owens, by virtue of his title which he held merely as a security for the money advanced for the purpose aforesaid, *dispossessed* the said Mary J. Owens of said slaves, and restored them to the custody of said Teat, from whom he (Forbes) had recently redeemed them. That said Teat was the agent of said Forbes, and that said Forbes was responsible for his acts. That said Teat was unworthy of trust or confidence, of which fact the said Forbes was fully apprised, and that by his carelessness and neglect said slaves were squandered by said Teat, and finally lost to complainant. The petitioners set forth in their petition that they have recently *discovered evidence* by which they are informed, and believe they will be able to prove that shortly after the said supposed marriage of said Mary with Mr. Owens, who finally abandoned her and went in 1840, to live with his lawful wife in South Carolina, she, the said Mary J. Owens, became distrustful of said Owens, and believing that his object in marrying her was to get possession of said slaves and make way with them. That under the apprehension of immediate danger from this direction, *Mary J. Owens sent for said William Teat, jr., and placed said slaves in his possession without the knowledge or consent of said Forbes*, and the said Teat so far from being the agent of their intestate in taking possession of said slaves, *was the Agent of Mrs. Owens*. The

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petition further sets forth that immediately after the slaves were thus put in the possession of said William Teat, jr., they were claimed by the administrator of William Teat, senior, who proceeded through the courts of Alabama to assert his right thereto, as the property of the estate of William Teat, senior. And that by virtue of an attachment issuing out of the Court of Chancery, subsequently, under a bill of complaint filed therein, he actually seized said slaves, and that under the provisions of said writ they were restored to the *possession of the said William Teat, jr.*, on his giving a bond and security to hold them subject to the result of the suit. That said suit appears from the record never to have been tried, but was dismissed for the want of prosecution in July, 1839. That although your petitioners were aware that the representative of William Teat, senior, had claimed said slaves as the property of said estate, and that there had been some litigation in the *Courts of law*, in reference thereto, yet, they were not, until recently, apprised of the fact of the seizing of said slaves by the *Court of Chancery*, and their consequent detention to await the result of said suit; nor had they any knowledge of the existence of said suit or of any of the proceedings had therein. That in about six months after the dismissal of said suit, said William Forbes sent a special agent to Alabama, to demand, recover and receive said slaves, and that the petitioner, James Bruce, has now in his possession the original power of attorney, given to said agent; but not being aware of the existence of said chancery suit, of the seizing and detention of said slaves by virtue of the proceedings thereon; or of the time of the dismissal thereof, he was not apprised of the important bearing of this fact of sending said agent in relieving his intestate (Forbes) of the charge of *negligence* in relation to the recovery of said slaves; and, therefore, this fact does not appear in the evidence, although

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known to said Bruce before the rendition of said decree.—The petition further sets forth that having no personal knowledge of the early facts connected with this case, they (the petitioners) employed Boling Baker, Esq., one of the counsellors in this cause, to proceed to Wilcox county, Alabama, where the facts mostly transpired, and procured all the testimony that could be had in reference thereto. The said Baker proceeded to make said examination, but that many years had elapsed since the occurrence took place; and said Baker succeeded in making out very little, if any, oral testimony; and although he instituted an examination into the records of said county, he failed to discover and report to said petitioners, the proceedings in chancery under which said slaves were seized and detained as before mentioned, owing as your petitioners infer, to the fact, as they are informed, that the chancery records of said county of Wilcox, had been transferred to Cataba, a town in another county in said State. The petitioners pray that the decree be set aside and vacated; that they be permitted to file a Supplemental Bill, take further testimony, and that a rehearing be granted and such further order taken as may be necessary to reach the equity of this case. The petitioners make affidavit in support of their petition.

As a matter of practice in similiar cases, and in order that the form and statements contained in this petition may not be followed as a precedent, the court will take occasion to say that the new matters discovered, the diligence exercised in searching the records in Alabama, and the statement of other facts, are not made with that clearness and fullness, and authenticated by exemplifications of the records newly discovered, and statement under oath of person employed to make research, as are necessary to readily put the court in the possession of matter whereupon license may be given to file Supplemental

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Bill to bring forward the new evidence and to grant a rehearing when produced. Under the facts, however, as they are stated, the Chancellor in the Court below was asked to grant leave to the filing of a Supplemental Bill, and to grant a rehearing; and upon a hearing thereof, the Chancellor "*ordered*" that the defendants be at liberty to file a Supplemental Bill, to bring before the court the matters stated in said petition relative to the new matters discovered since the making of the Interlocutory Decree in this cause, on the 4th of January, 1858, and for relief as they should be advised; and further, that they be at liberty to have the original cause brought on to be reheard, and to come on at the same time with the cause upon said bill."—From this order appeal is taken to this court.

On the part of the appellee it is contended that the decree of 1858, is a *final* decree enrolled, and that a Bill of Review in the nature of a Bill of Review, was the only remedy, if there was any, in this cause; and that, therefore, the court below erred in granting leave to file a Supplemental Bill. This brings us to determine whether said decree was final or interlocutory. The decree is in the following words: "This cause came on to be heard upon a bill, answer, exhibits and proofs, and upon argument of counsel; and the court having considered the matters in issue, it is ordered, adjudged and decreed, that the complainant is entitled to redeem from the possession of defendants, as administrators of William Forbes, the slaves Peg, George, Melinda, Dolly, Harriet, Easter, Eliza and Maria, and their increase since the month of November, A. D. 1835, upon the payment of the sums advanced thereupon by William Forbes, in his life time, and interest thereon, and is entitled to recover the hires of said slaves to the present time from the time the same went into the possession of the said William Forbes, or his Agent, William Teat, which date may be estimated in taking the

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account as the 1st day of May, A. D., 1836; and if the said slaves cannot be found in possession of defendant's administrators as aforesaid, or cannot be procured by them, the complainant is entitled to recover in lieu of said slaves, the value thereof to be ascertained. And it is further ordered that an account be taken against the estate of the said William Forbes, of the hires of said slaves and their increase since the same went into the possession of said William Forbes, or his agent, William Teat, to be considered as the 1st day of May, A. D., 1836, together with interest on said annual hires, and that an account be also taken of all the moneys, provisions, supplies and other articles of value advanced by the said William Forbes, in his life time, to complainant, with interest thereon, and that said accounts be made up to the date of said report to be made, and a balance struck between the two accounts, and that an account be taken of the value of said slaves and their increase at this time and at the first day of May, 1836, and at the latest date the same can be traced, and it is referred to Robert C. Lester, master, to take and state said accounts, with leave to the parties to offer evidence thereon before the master, and the evidence when taken, the master shall preserve in writing and report with his report hereon; and all other matters are reserved until the coming in of said report."

This court in the case of Griffin, Administrator, vs. Orman, decided at the Term held in 1860, (see—Fla., page 47) defined what constitutes a Final, and what an Interlocutory Decree. It was held in that case that a "decree directing a reference to a master for the purpose of ascertaining *any material fact* in the case, is not a *Final Decree*, but an Interlocutory one." We see no reason for reviewing and reversing our decision in this particular, and hold the definitions as laid down in that case to be correct. Upon examination of the above decree, claimed to be a final decree, it

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will be seen that it refers this cause to the master to ascertain several facts.

First: To ascertain the *increase* of said slaves since the month of November, A. D., 1835.

Secondly: To ascertain the sums advanced thereon by William Forbes in his life time, and interest thereon.

Thirdly: The hires of said slaves from the first day of May, 1836.

Fourthly: If said slaves cannot be found in the possession of the administrators of said Forbes' estate, or cannot be procured by them, then to ascertain the value of them.—The master was also to enquire and report, whether said slaves could or could not be found in possession of said administrators, and whether they could be procured by them.

Fifthly: To ascertain all the moneys, provisions, supplies and other articles of value advanced by the said William Forbes, in his life time.

Sixthly: To ascertain the value of said slaves and their increase at that time, and at the latest dates the same can be traced.

Seventhly: The master is directed to *preserve* the *evidence* taken before him, and to report it.

Lastly: *All other matters are reserved until the coming in of said Report.*

Here are several material facts in the case, which, when ascertained, are to be reported to the court with the evidence. Matters are also reserved until the coming in of the report. This report may be excepted to, disproved and overruled, or confirmed and made absolute by order of the court. This being the case, it follows, there must be a final decree upon it. The decree we have under consideration, although it ascertains and determines all the other equities of the case, leaves unsettled the equities relating to the matters referred, as to which material facts are

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sought, and reserves questions. That something further was left to be done appears evident, as the Chancellor directs a report. We are of opinion the decree in question was an Interlocutory Decree. Having considered this an Interlocutory Decree, the next question is, whether the remedy, if there was any in this case, was by asking leave to file a Supplemental Bill and a rehearing on the evidence thus brought forward. Had the application in this petition been but for a review reversal, and setting aside said decree, then the case of Putnam vs. Lewis and wife would be applicable, which decided that a Supplemental Bill in the nature of a Bill of Review, would seem to be the appropriate remedy. See also Scott vs. Blain, 1 Baldwin, 287. But the petition seeks something more—a rehearing is sought on the ground of newly discovered evidence, discovered after the Interlocutory Decree. The rule is that the court will grant such a rehearing upon the filing of a Supplemental Bill after an Interlocutory Decree enrolled, if the evidence is of such a nature as to entitle the party to relief upon a Bill of Review or Supplemental Bill in the nature of a Bill of Review, after a Final Decree, but not otherwise.—Baker *et ux.* vs. Whiting *et al.*, 1 Story's Rep., 233.

This doctrine was also fully recognized by Mr. Chancellor Kent, in Wiser vs. Blachley, 2 John Ch. Rep., 124; and Livingston vs. Hubbs, 2 John. Ch. Rep., 124; and in Dexter vs. Arnold, 5 Mason Rep., 303. In the case of Jenkins vs. Eldridge, 3 Story's Rep., 307, Judge Story says: "The real question, therefore, for the consideration of the court is, whether leave should be granted to file a Supplemental Bill to bring forward the new evidence. In substance, there is no difference between this case and the case of leave to file a Bill of Review or a bill in the nature of a Bill of Review, except that the latter is solely applicable to cases

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where there has been a *Final Decree*, whereas applications like the present may be before or after an Interlocutory Decree. But the doctrine of the court as to the nature of the evidence which will justify and support the application, is in such a case governed by the same consideration and limited by the same rules. The questions, then, properly for inquiry are, whether if the decree in this case was a *Final Decree*, the appellees under their petition, and the facts therein set forth, would be entitled to relief upon a Bill of Review or a Supplemental Bill in the nature of a Bill of Review. To determine this we are to enquire what are the rules governing courts granting leave to file a Bill of Review? In Story's Commentaries on Equity Pleadings, Sec. 412, they are laid down in substance, as follows: 1st. Leave to grant it will not be granted without an affidavit that the new matter could not be produced or used by the party claiming the benefit of it in the original cause. 2d. The affidavit must also state the nature of the new matter, in order that the court may exercise its judgment upon its relevancy and materiality. In *Dexter vs. Arnold*, 5 Mason's Rep., pp. 310, Story, Justice, says: The ordinance of Lord Bacon constitutes the foundation of the system, and has never been departed from. The ordinance is there inserted, and will be seen upon reference to that case. It is now the established exposition of the ordinance, that the new matter shall not have been discovered until after publication has passed.—And as in our courts all decrees, whether Interlocutory or Final, are not only by the practice of our courts, but by statute provision, deemed to be enrolled as of the day on which it is entered on the minutes of the court, a bill in nature of a Bill of Review, it is not appropriate, and therefore out of use. In the first place, the new matter must be relevant and material, and such as *might probably have produced a different determination*. In other words, it must

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generally be new matter to prove what was before in issue, and not to prove a title not before in issue; not to make a new case, but to establish the old one. In the next place, the new matter must have first come to the knowledge of the party after publication has passed. And in the next place, the matter must not only be new, but it must be such as the party, by the use of *reasonable diligence*, could not have known, for if there be any laches or negligence in this respect that destroys the title to the relief, 2 Smith's Ch. P. page 58 (marginal page.) The party must show that the new matter is relevant or that there is probably cause that it may be relevant to the matters in question. On this application for leave to file Supplemental Bill and for a rehearing this court can only consider the prior Interlocutory Decree, so far as to ascertain and enquire whether the new matter sought to be introduced is relevant and material, and such as had the same then been before the Chancellor, might probably have produced a different determination. In determining this, although the cause is not before this court on its merits, yet it becomes necessary for the court to ascertain and fix the title held by Forbes, in order to a just appreciation of the appellee's new proof. The petition for leave to file Supplemental Bill, sets forth what the petitioners are informed and believe was the title ascertained by the court. The decree grants the right of the said Mary J. Owens *to redeem* said slaves upon payment of moneys, &c., advanced, and from which we draw the inference that the court below considered the said Forbes a mortgagee in possession, and guilty of laches and negligence, whereby the slaves became lost to both mortgagor and mortgagee, and the estate of Forbes consequently liable. The original bill of complaint alleges that one William Teat, senior, departed this life in the spring of 1835, and by last will and testament bequeathed these negroes to the said Mary Jane Owens, who was his

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widow, to be enjoyed by her at her will and pleasure through life, and there to descend to her children, the heirs of his body. The bill further alleges that previous to the death of Wililam Teat, senior, and before his removal to Alabama, and while he was domiciled in the State of South Carolina, he, the said William Teat, senior, made to his son William Teat, junior, a bill of sale of said negroes; that the said William Teat, senior, remained in possession of them, and was in possession of them at his death. That during the life time of William Teat, senior, a dispute arose between him and his son, respecting, the bill of sale held by said William Teat, junior, which his father denounced as a fraud upon him, and required his executor to contest the same; that these circumstances are alluded to and spoken of in the will of said William Teat, senior. The said Mary J Owens claims in said bill of complainant, that the said slaves and their increase, passed to her under the will of said William Teat, senior, unless the title thereto was absolute in said William Teat, junior.

Upon a careful examination of the testimony and exhibits, it would seem clear that Mrs. Owens was mistaken in her bill of complaint, wherein she sets forth that William Teat, junior, held a bill of sale of said slaves from William Teat, senior. The evidence established, as the court below seems to have considered, that William Teat, junior, derived his claim on said negroes, by virtue of an incumbrance thereon, in favor of one Dannelly; that Dannelly executed to him whatever title he had, and it would seem that the court below considered the claim of William Teat, junior, that of a mortgagee. Whether as such he was in or out of the possession of the slaves, does not seem to have been considered. The said William Teat, junior, however, transfers all his title to the said William Forbes, in his life, who executes an agreement to Mrs. Mary J. Owens, by which

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he, the said "William Forbes, obligated himself to deliver to the said Mary J. Owens a certain number of negroes on her paying to him, the said Forbes, the sum of eight hundred and some odd dollars, with interest."

From this history of title, it would seem, that Forbes was only the holder of such title as he derived from William Teat, junior, with the addition of an equitable lien upon the same, created by Mrs. Owens to him, under and by virtue of his transactions with her. It appears that the court below, under the testimony, considered the said William Forbes in the light of a mortgagee in possession. If, therefore, the said William Forbes was liable for the loss of the slaves and for their hires, it was upon the ground that he was a mortgagee in possession of the same. From this view of his title, it would seem that the material issue was, whether said Forbes was or not in possession of said slaves, and whether they were lost to the mortgagor. Mrs. Owens, being a legatee under the will of William Teat, senior, together with her agreement with the said Forbes, might file a bill to redeem. The Administrator of William Teat, senior, with the will annexed, might also have filed a bill to redeem, and would probably have had the prior right, unless he assented to her legacy. This, then, being the issue at the time the decree was made, it would seem, that the new matter which goes to deny the possession and refute the charge of laches, is relevant and material, such as if known might probably have produced a different determination. The counsellor for the appellant objects to the newly discovered evidence, and insists that it is merely *cumulative*, and, therefore, ought not to be admitted. The cases of Baker vs. Whiting, 1 Story, and Jenkins vs. Eldridge, 3 Story Rep., 310, are relied upon as decisive of this point.—Upon looking into the latter case, the Judge, in commenting upon the evidence offered in that case, which he considered

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as auxiliary or corroborative, says *it establishes no new facts of itself decisive of the merits of the cause*; and necessarily changing the original decree, but is merely corroborative or *auxiliary* to what is now in the cause. This case fully establishes what we think is the case now under consideration, viz: That if the evidence sought to be introduced establishes *a new fact of itself*, decisive of the merits of the cause, and necessarily changing the original decree, the rehearing would be granted, and there is nothing to the contrary in Baker vs. Whiting.

Now, what do the petitioners seek to prove? They say they expect to prove that the slaves were placed in the possession of Teat, junior, by Mrs. Owens, without the knowledge of Forbes; that William Teat, junior, was her agent, thus making her a *mortgagor in possession*. They also expect to prove that the Administrator of the estate of William Teat, senior, by process in chancery, seized upon these slaves and kept them under seizure, or held possession, he having a right to do so, unless he assented to the legacy, and in other words, they expect to refute the charge of laches, proving facts not known at the hearing, and about which no proof was offered. To prove that the mortgagor remained in possession, is not to prove what is auxiliary to or corroborative of any proof in the cause upon the hearing, but to prove a fact wholly and entirely new, and which changes the whole aspect of the case. The remaining question is whether the appellees had knowledge or could by *reasonable* inquiry and diligence, have acquired knowledge of the facts stated in the petition before the hearing of said cause, so that they might have availed themselves of it before the decree. If they had such knowledge, or could by reasonable inquiry and diligence have obtained it, then it is clear they are not entitled to the relief sought. It is difficult under the facts disclosed by the record to resist the

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conclusion that the appellees were put upon their inquiry and the exercise of diligence as to the agency of William Teat, junior, and the institution of suit by the Administrator of William Teat, senior, in Alabama; and were it not for the fact that they did use diligence in ascertaining the suit at law, and there were two suits in different counties—one in a court of Law, and the other in a Court of Chancery—and therefore, they might even in the exercise of a “*reasonable inquiry and diligence*,” they being Administrators, have been misled.

Had Mr. Forbes been alive and made the application, the exercise of greater diligence would have been required of him, as he would be presumed to know his defense.

It will be noticed that Forbes died in 1852; that Mrs. Owens, the complainant, removed to the State of Florida in 1840, and became the close neighbor of said Forbes; that this mortgage of William Teat, junior, Forbes paid off, at the instance of Mrs. Owens, in 1835; that the transactions occurred in Alabama; that no suit was ever brought against Forbes, in his life time; but after his death the present bill is filed against his Administrators. The Administrators are strangers to the transaction, and have to look for evidence to defend the estate. For all that appears in the record, the Agent (who was a practicing attorney of good standing and legal accumen,) sent to Alabama to search the records, was competent. His mission proved, so far as the case in Chancery is concerned, as fruitless. Reasonable diligence and inquiry might have been baffled by the fact that these suits were in different counties. The appellees were put upon their inquiry in the county of Wilcox, and not in the town of Cahaba, in another county; therefore, as the appellees are administrators, the same stringency in ruling as to knowledge ought not to be exercised. We are, therefore, of the opinion, that under the peculiar circumstances of this

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case, the reasonable diligence and inquiry within the rule was made, and as with this they did not obtain the evidence, but have discovered it since the Interlocutory Decree, the Chancellor in the court below was correct in granting the leave to file the Supplemental Bill, and in granting the rehearing when evidence was adduced. The order of the court below is affirmed, each party to pay their own costs accrued in this appeal.

CITY OF APALACHICOLA, APPELLANT, VS. LEWIS CURTIS AND OTHERS, TRUSTEES, DIRECTORS AND RECEIVERS OF THE APALACHICOLA LAND COMPANY, APPELLEES.

1. On the application for an injunction, a Chancellor may go into the consideration of the merits as disclosed in the bill, and which are intrinsic and dependent upon its express allegations and charges.
2. On a motion for an injunction, the court will not commit itself to points or questions that may arise at the final hearing.
3. A judgment in ejectment is conclusive against the defendant for all profits which have accrued since the date of the demise, stated in the declaration in ejectment, but if the plaintiff sues for any *antecedent profits*, the defendant may make a new defence.
4. The right to mesne profits is a necessary consequence of a recovery in ejectment, and the recovery in ejectment by an incorporated town of an easement which is a real franchise holden by the town under provisions of her charter for the benefit of all the citizens, is no exception as to the right to mesne profits during the occupancy of their property.
5. A plaintiff in ejectment cannot, after recovery, turn this action at law for mesne profits into a suit in equity, and bring a bill for an account of the profits, except in the case of an infant or *some other very particular circumstances*. The "particular circumstances" excepted in laying down this rule extend to all cases which involve an equity which the plaintiff *cannot make available at law*.
6. A suit in Chancery lies for an account of mesne profits after a recovery in ejectment, if the bill shows a right to discovery and relief in a matter incident thereto, and the court having jurisdiction for one purpose may finally settle the whole merits of the cause.

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1. Where the face of a Bill in Chancery shows a case barred by the statute of limitations, and no circumstances are stated which take the case out of the operation of the act, advantage of it may be taken on a motion for an injunction.
8. In order to arrest by injunction claims established by a decree of a Court of Chancery, it must be shown that the applicant has a prior right which he has not lost by laches.

This case was decided at Tallahassee.

The bill sets forth that the Apalachicola Company, being proprietors of a large tract of land, proceeded in the year 1836 to lay out a town on the tract known as the City of Apalachicola, then already having considerable population and a large and growing trade and commerce. That the company laid out regular streets and squares, surveying them in a regular manner, and planting stakes, so as to designate the same, and distinguish in a proper manner the different sites and locations, and then proceeded to cut down brush and trees, to fill up and remove swamps and other inequalities, and to grade in proper manner. That a map of the town was likewise prepared, which, after being regularly adopted by the Directors of said Company and Trustees, was in due form presented to, and solemnly adopted by the City Council, on the 2d April, 1836. That this map, after its adoption was lithographed, and copies thereof used at the sales of the lots publicly made; that they were largely circulated on the day of the sale, and that persons buying at said sale were guided by it and the stakes, in their selection of lots; and the contracts for sale of said lots and deeds, which were numerous, and amounting to a very large sum of money, were all made to refer to this map; and said map was regarded as the true and authentic map of the said town; that by this map *the streets leading to the river were left open*—extended and continued thereto—no lines intervening at or near their termination, so that there was,

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as well by the said maps as the large sale, and other action predicated on, and connected therewith, a full, complete, and entire dedication of the land near and to the river, in the direction of the streets, as fully and completely, to every intent and purpose, as of the streets themselves; and the city was entitled to the full and free use, occupancy and possession thereof, as the true and rightful owner thereof.—The bill further sets forth, that afterwards, to-wit, in the year 1837, the company sent a special agent to said town of Apalachicola, “to examine and report upon the situation of the property;” that said agent was also President of the Board of Directors. That this agent, having possession of what purported to be the original map of the town, made an alteration therein, by making the lines of the wharf property extend across the streets, thereby filling up the vacant space at the end of the streets by lines of his own creation. The bill charges that the design of this action was to revoke the grant previously made to the city, to deprive it of rights solemnly vested by previous dedication, and that the same cannot be otherwise regarded than as a falsification of the muniment by which property holders held their lots, procured at most extravagant prices. The bill avers that the said agent, President of the Directors, had no power to make said alteration; nor could so important an act as the change aforesaid be made without the co-operation of the city authorities, of the citizens, and of purchasers of lots, and without this the alteration or revocation was impotent and of no avail. The bill further avers that after said alteration of said map, the company proceeded to take possession and control of the land at the end of the said streets, to erect wharves upon them, to rent them, and to raise revenue and benefits from them. That they continued such possession, use and control from 1838 to 1850; that in order to recover back the possession of said land, lying and being at the foot of said

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streets, the said City of Apalachicola was compelled to institute an action of ejectment against the said Apalachicola Land Company, which, being instituted, they, on the 26th day of June, 1850, recovered judgment in the District Court of the United States, at Apalachicola, against the said company, for the recovery of the same; that the said company took a writ of error to the Supreme Court of the United States, and the same was dismissed.

That afterwards the said Apalachicola Land Company instituted their action of ejectment in the said District Court for the recovery of said land at the foot of said streets and retrial of said case; but on the 19th February, 1857, of their own voluntary motion, discontinued the same.

The bill further avers that the said ocmpany, not content with these two several efforts, one Charles Ellis, a receiver for said company, recently appointed by the court in another suit, instituted another suit by ejectment for recovery of the said land at the foot of said streets, which suit has been removed to the county of Gadsden, and is still depending there.

The bill further avers that the said company are indebted to the City of Apalachicola in a large sum of money, to wit: near the sum of twenty thousand dollars, for the use, occupancy and possession of the said property for the time it was held by them. That they would have instituted suit at law for the recovery thereof, but for the fact that one Andrew S. Garr, having a claim against the said company for the sum of about eight thousand dollars, instituted a suit in Chancery in the Leon Circuit Court against the Trustees of the said company, and others, praying that the court would execute the trust in place of and in behalf of the said Trustees. That an order was passed appointing a Receiver to take charge of the said property, and to sell the same on the terms therein prescribed; and the said land has been en-

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tirely sold under the direction of the Receiver, and in whose hands and possession are the notes, bonds, cash, &c., received for and on account of said land.

The bill further charges that the Trustees are *non residents* and reside beyond this State, and that the proceeds of the land formerly belonging to said company, and now in the hands of the Receiver, constitute the only means or property of the said Trustees of said company, or of the said company, and that upon a distribution thereof, the same would be entirely dissolved, and that the funds aforesaid are the only means for the satisfaction of the claim of the city in this behalf. That although there has been an agreement for the distribution of these proceeds among certain parties therein named, that the same, nor the decree founded thereon, cannot and should not be carried into effect to the prejudice of the rights and interests of the City of Apalachicola.

The bill further charges that the non residence of the said Trustees beyond the State, and the continued agitation and expenses created by these suits, have been the cause why an earlier application and suit have not been made for the recovery of these rents and profits.

The prayer of the bill is to enjoin the distribution of any sum or sums of money to the Trustes or any of the Agents of the said company, or any other person, until the claim of the City of Apalachicola for rents, as aforesaid, is fully and entirely satisfied. That the map of the city, so falsely, illegally and improperly changed and altered, be ordered to be delivered up and cancelled, and declared to be false, untrue, and entitled to no verity in this respect; and its use on the trial of any suit by the said company or any one of them, be utterly prohibited and enjoined. That the said Ellis state by what authority and direction he has brought suit for said property, and be ordered to dismiss it as founded in fraud and error. That the court will direct an ascertainment of the amount

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to which he is entitled for rents and profits and use and occupation by said company of the said property, and give a final decree therefor, and order that the same be paid out of the fund in the hands of the Receiver or other officer of the court, in the case Garr or the defendant, who have received the same, to be made liable therefor, and a decree pass against them to that effect.

By an amendment to the Bill, the complainant avers that they have been subjected to and paid large sums of money for Counsel and Attorney's fees, in the prosecution and defending of said suits; and that the said city is entitled to damages for withholding the said premises from said company, to be ascertained either by a suit of trespass at law under the order of the court, or that the court, through a master, ascertain the same in such manner as they may determine, so as to have as well their damages as the mesne profits made by the said Land Company from the land aforesaid, and also the costs and expenses incurred by the said city, for instituting and defending the suit aforesaid, and in every other respect, &c.

A motion was made before the Chancellor for an injunction as prayed; and on the 16th January, 1861, it was ordered and adjudged that said injunction be refused. From which order an appeal under the statute of 1855 is taken to this court.

Thomas Baltzell for appellant:

This is a suit to recover mesne profits, or the rents and profits of certain wharf lots, after a recovery in ejectment.

The right of toll on wharves is a franchise, or privilege in the subject, existing by grant from the King in England or the Legislature in this country.—3 Paige, 75, 313; 2 Black. Com., 38, n. 53.

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The right is conferred by charter of the city to rent wharves, appoint wharffingers, &c.—Charter City Apalachicola.

For an instruction upon this right, or a disturbance of it, whether it be an easement or a franchise, there is a remedy.—3 Blackstone, 237; 1 Arch. Rep. 431.

On general principles, “Land includes not only the ground or soil, but everything attached to the earth, whether by the course of nature or by the hand of man.”—3 Kent. Com. 401; Co. Litt., 4.

“Whoever takes possession of land to which another has better title, whether *bona fide* or *mala fide*, is liable to the true owner for all the rents and profits he has received.”—Green vs. Biddle, Supreme Court U. S., 8 Wh. 1; Yerger, 380—1.

“He is entitled, both in law and equity and from natural justice, to rents and profits from the time the title accrued.”—*Ibid*.

“What is the land but the profits,” is the question asked in this very great and important case, and they (the court) say, “a devise of the profits is a grant of the land itself.”—Green vs. Biddle, 8 Wh., 1.

Even if the trustees did not commit the fraud charged, they are “not entitled to retain the fruits of another’s misconduct, nor are they exempt from the duty of restriction.”—Willard, 147; 14 Vesey, 273, 289.

The judgment in ejectment ascertaining the right of plaintiff, the wrongful ejection by defendant, and “the right to the rents and profits, is a necessary consequence of the recovery in ejectment, and the judgment is conclusive.” 2 John., 369; 3 John., 489.

Complainants are “entitled to be reimbursed what they have been compelled to pay in obtaining a restitution of the property.”—Doe vs. Perkins, 8 B. Mon., 198. “To extra trouble and expense in prosecuting the suit.”—15 Conn., 236.

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Money acquired by fraud, as charged in this bill, cannot belong to the wrong doer who holds it, but to the proprietor of the property through which it was obtained.

The statute of limitations does not avail defendants; they are non residents, and were never liable to be sued in the State, and cannot avail themselves of the law in this respect.—Blanch. Limit., 117, 113.

It is objected that the wharves are a part of the street, are open to the public and not subject to the imposition of toll. Defendants cannot make this defense. They are sued for the profits made by them. In reply they say profit should not, and legally could not be made; then they have it illegally and improperly, and should give it up. How are they entitled to the money received for toll on those wharves, if they are not subject to toll?

M. D. Papy for appellee.

FORWARD, J., delivered the opinion of the court.

The bill, it will be seen, is filed in this case for the purpose of restraining the use of the map, alleged to have been fraudulently altered, for any purpose whatever, against the city, and for the recovery of mesne profits after judgment in ejectment, and for the recovery of the costs of said suit in ejectment.

The main question is whether the bill makes out a *prima facie* case—such a case as required the Chancellor on the application for said injunction in the exercise of legal discretion according to the rules of equity and good conscience and practice of the court, to grant said injunction, or in other words, whether the Chancellor erred in refusing said injunction.

The rule of law is, that on an application for an injunction, a Chancellor may go into the consideration of the merits as disclosed in the bill, and which are intrinsic and depend-

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ent upon its express allegations and charges.—Ross vs. Hamilton, 1 Dess., 137; and this court, in the case of Yonge and Bryant vs. McCormick, 6 Fla., 369, held it also to be a rule of practice, that “on motion for an injunction, the court will not commit itself to points or questions that may arise at the final hearing.”

It is unnecessary to consider so much of the bill as sets forth the alteration of the map, and asks the restraining of the use of the same, as also the restraining of suits, only so far as the same gives jurisdiction to this court for that purpose, and the consideration of the use that may be made of said map in any recoupment of rents and profits that may be asked. The bill does not contemplate the injunction prayed in this particular until the final hearing of the cause.

In a question of recoupment or set off of value of improvements to the claim for mesne profits, the question of bona fide possessions may be important, and on that issue, whether the company went into possession by color of this alleged altered map or not, may, it is conceived, be attempted to be raised; therefore, the setting of it (the map) aside, might be proper for the exercise of equity jurisdiction.

The bill sets forth a recovery in an action of ejectment of the premise in question, and also the possession of the same (obtained by said suit) in the appellant, avers a right to mesne profits in the nature of damages, and alleges reasons why owner, after recovery of land, resorts to a bill in equity against the late occupant for an account of the rents and profits.

On the part of the appellant it is contended that the right of the plaintiff in an action of ejectment, is a necessary consequence of a recovery in ejectment, and the judgment is ejectment is conclusive, and that the case at bar is not an exception to the general rule.

In Blackstone's Commentaries, Vol. 3, page 205, the

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commentator, in speaking of recoveries in ejectment and right to action of mesne profits, says: "The judgment in ejectment is conclusive against the defendant for all profits which have accrued since the date of the demise stated in the former declaration of the plaintiff, but if the plaintiff sues for any antecedent profits, the defendant may make a new defence."

The Supreme Court of Tennessee, in the case of *Nelson, vs. Allen & Harris*, 1 Yerger, page 383, says: "A right to land essentially implies a right to the profits accruing from it, since without the latter the former can be of no value."

Again, in *Green and others vs. Biddle*, 8 Wheaton's Rep., 1, the Supreme Court of the United States say: "At common law, whoever takes and holds possession of land to which another has a better title, whether he be a bona fide or a mala fide possessor, is liable to the true owner for all the rents and profits which he has received; but the disseisor, if he be a bona fide occupant, may recoup the value of the meliorations made by him against the claim of damages."

In *Benson and others vs. Matsdorf*, 2 Johnson's Law Reports, page 371, the court say: "It is well settled that the right to mesne profits is a necessary consequence of a recovery in ejectment."

See also *Baron vs. Abeel*, 3 Johnson's Law Rep., 471. In the case of *Averitt vs. Brady*, 20 Georgia, 523, the Supreme Court of Georgia say: "In an action for mesne profits against a trespasser, the rule is quite liberal enough, that if the improvements made on the land increase the profits, it is proper for the jury to take into consideration the improvements and to diminish the profits by them, but not below the value without the improvements."

In 4 Philips on Ev., 315, it is stated that the plaintiff must prove the value of the mesne profits, to be estimated

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by the amount of the crops taken, or by the fair annual value of the premises.”

On the part of the appellee it is contended that the plaintiff in the court below is not entitled to mesne profits, because the right to the street is only to hold it subject to public easement, and was not the source of revenue; therefore the case at bar is an exception to the general rule of recovery in ejectment.

This brings up the inquiry into what are the rights of the City of Apalachicola, and whether this case is an exception. The bill sets forth that prior to the incorporation of the City of Apalachicola, to wit: in 1836, the proprietors of the land dedicated the street of the town, extending then down to the river, to the use of the public; that afterwards, on the 2d February, 1838, an act of incorporation was passed by the Legislature and said town incorporated.

Here was a dedication to public uses, which, by operation of law, became vested in the officers of the city as soon as they became incorporated, for the benefit of the citizens.—Town of Pawlet vs. Clark, 6 Cranch, 331; 6 Peters, 431.

According to Hilliard on Real Property, Vol. 2, page 16, an easement for the public in the land of others, is not personal estate, but a real franchise, holden by the commonwealth for the benefit of all the citizens. In the case at bar, the easement was a real franchise holden by the corporation for the benefit of all the citizens. We have nothing to do on this appeal with the question whether an action of ejectment will lie to recover possession of a street. That was determined by the recovery in ejectment, and by the recovery and judgment it was determined that the appellees or defendants in that suit, were guilty of the trespass and ejectment complained of. This establishes the entire ownership for the use of the inhabitants.

The town, by authority of the Legislature granted in the

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act of incorporation, have given to them the right to regulate, erect and keep wharves, to appoint wharfingers, &c. The appellees, or rather the company, obstructed their right, took possession of the lands upon which they might have erected and kept wharves, prevented the city from building wharves there, built for themselves thereupon wharves, received rents and profits thereof and continued to hold the same until they were turned out of possession by ejectment. Now, when the city is seeking damages for the obstruction, they are told that the case of *Rowan's Ex'rs vs. Town of Portland*, 8 B, Munroe, 257, establishes that all the City of Apalachicola could charge for toll, wharfage or fees, or could collect for rent of wharves built by them, was a sufficient sum to secure a fair reimbursement and remuneration for their costs and trouble and expense of keeping them up, and as this was paid by the company, that, therefore, the city have no action for use and occupation. To this our inquiry is now directed. By reference to authorities, it will be seen that trespass will lie at the suit of a corporation who have the freehold or actual possession of the soil of the market place against a person who places stalls, tables, &c., there without leave. *Mayor, &c., of Norwich vs. Swan*, 2 Wm. Blackstone, 1116; 2 Strange, 1238. A corporation may also have an action in the case for the interruption of a right of way vested in them. Grant on Corporations, 194 (side paging.) Would it be any answer to the former trespass when damages are asked, to say: We suppose the dedication of the new market place was for the advancement of the interests of the town as a commercial place, and not with a particular view to any profit to be derived from rents and tolls, or otherwise, and although the stalls, tables, &c., were erected without their leave, and while the trespassers hold them, they made charges and profit, yet as the town incurred no exuense for this particu-

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lar object, we think the town must be content with the recovery of the right alone, without damages—would this be a legal answer in justification of a trespasser? We think not. If in response to the action admitting the right of action for an interruption of a right of way it is contended the corporation were bound to keep it uninterrupted, we ask whether it would be an answer for claim for damages for said interruption to say, the town has incurred no expense in erecting the building or wharf which interrupted the street, therefore the town must be content with the recovery of the right alone, without damages.

It does not necessarily follow, that the erection of wharves at the foot of these streets prevented the egress and ingress of the citizens to the water, for the reason that they may be so constructed as to afford all the privileges granted to the inhabitants; but something more was dedicated; the street was vested in the corporation for the benefit of the citizens.

In the erection of wharves a new improvement was commenced, and was authorized by the act of incorporation.—The corporation then had the right of building wharves, a right to regulate them for the benefit of the citizens, or, they being the owners of the land, for the benefit of the citizens, had the right of renting out the land; the rents and profits would go to the town treasury for the benefit of the citizens, but the company, by taking possession of these lands, without the leave of the corporation, interrupted their franchise and deprived the citizens of the benefit they otherwise would have received from these lands. It is said that the tolls, wharfage and benefits received by the Apalachicola Company, although by usurpation, was a wrong rather against those who paid them than upon the town, and as the town itself had only the right of charging toll to an extent sufficient to secure a fair emburserment and remuneration for the cost of the wharves and trouble, that, therefore, the

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town cannot be entitled to collect for the benefit of the inhabitants and profits. This, upon first view, carries with it a great deal of plausibility. But let us examine it. In the first place, there is nothing in the bill to show that the Apalachicola Company did not collect more than a fair reimbursement and remuneration, while every presumption is that they erected the wharves and kept them up for profit. There is no doubt the commerce of the town was advanced by their erection, but the question arises, whether not only the commerce of the town, but the citizens, would not have been more benefited by the exercise of the franchise of the town, which was interrupted by the usurpation of the company. Again: If the citizens had been required to pay more than the town was authorized to ask, they, indeed, were wronged, and we ask, was and is it not the right and duty of the trustees of the people, i. e., the corporation, to collect the rents and profits of the land held for their benefit, and which has been wrongly usurped to their injury? Is it any answer for them to say the people, your *cestui que* trusts, were wronged, and therefore, you, their trustee, have no action for mesne profits for their benefit? Is it certain that the right of charging toll, by the town itself, could not have been carried beyond a fair remuneration and reimbursement for the costs of the wharves and the keeping of them up?

The wharf case in 3 Bland 361, is cited as maintaining that a wharf may be dedicated by the owner to the public use, and no toll can afterwards be imposed upon the use of it but by authority of the Legislature. We regret that we have not this volume for examination; not having it, we take the headnote as a suggestion. In the case we are considering, the Legislature of our State did give authority to take toll for the use of the people, if the corporation should make that one of the regulations. There is no restriction of the corpora-

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tion, and if they can collect tolls at all, we see no reason why they have not the descretion to make the wharves profitable, the proceeds of which go into the treasury for the benefit of the people.

If this discretion should be abused, the people have their remedy. The case of the Town of Maysville vs. Boon, 2 J. J. Marshall, 226, was the case of a ferry established by the town on land lying at the foot of a dedicated street.—The court say, a ferry is a franchise real; it is a common highway. And whether the general interests or that of the town of Maysville be considered, it would appear more expedient that the citizens of the town, through their appointed organs, should be responsible for the proper management of a ferry at their town, and enjoy the profits resulting from it, than that its control and emoluments should be vested in any one ciitzen. The court in this case did not think the town restricted to a reimbursement and remuneration for the costs of the ferry—on the contrary, thought they could make profits thereon.

In this court, in the case of Geiger and others vs. Filor and others, 8 Fla., 347, the court say: “The power and right of a city to erect a wharf being conceded, it seems to us that the imposition of a toll would and should depend upon a right discretion in the city council.”

The case of Rowan’s Exr’s vs. Town of Portland, was decided by a very able court, and so far as it adjudicates the case before the court, is entitled to great weight. That portion of the opinion of the court which is not directly in analogy with the acts of the case under consideration, can only be looked upon as extra judicial dicta. In that case there is no recovery in ejectment. The right of property and possession was sought to be declared. There was no judgment in ejectment, conclusive evidence against the defendant for all profits, &c., as in this case. Had that case

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been tried at law, and the defendants found guilty of trespass and ejectment, the court might not have concluded that the town must be content with the recovery of the right alone, without damages or an account. On the contrary, the case of the Trustees of Augusta vs. Perkins, decided at the same term of the court, as will be seen on page 209 of that book and which was an action by an incorporated town for mesne profits after a recovery in ejectment, the same court, in speaking of the set-off against their claim for mesne profits, say: "But whether he has such claim or not, he is liable to the Trustees for the mesne profits during his occupancy of their property."

It will be seen that this case of the Trustees of Augusta was again before the court at page 198 of the same book, and a full statement of the case will be found reported in 3 B. Munroe's reports, page 437.

In the case of the City of Savannah vs. the Steamboat Co. of Georgia, R. M. Charlton's Rep., page 350, Judge Law, in delivering the opinion of the court, says: "The propriety of distinguishing between the corporation, when the legal title of the land is in them, and an individual, does not occur to me." "The ground itself is to be held and appropriated to the purposes of the grant."

So in this case, we can see no distinction in the right of action for mesne profits, after recovery in ejectment by the City of Apalachicola under the provisions of her charter, from that of the recovery of an individual.

The appellee says there is no equity in this bill. The plaintiff having recovered in ejectment, his remedy, if any, was by action of trespass at law for mesne profits.

The rule authorizing the owner after recovery of the land, to resort to a bill in equity against the late occupant for an account of the rents and profits, is laid down as follows:

"Where a man has title to the possession of lands, and

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makes an entry whereby he becomes entitled to damages at law for the time that possession was detained from him, he shall not, after his entry, turn that action at law into a suit in equity, and bring a bill for an account of the profits, except in the case of an infant or some other very particular circumstances." 1 Fonblanque, page 14. The particular circumstances excepted in laying down this rule, extend to all cases which involve an equity which the plaintiff cannot make available at law. Drury vs. Conner, 1 Harris & Gill, 220; Nelson vs. Allen, 1 Yerger, 373; Grimes vs. Wilson, 4 Blackford, 335; Curtis vs. Curtis, 2 Brown Rep., 622.

In Curtis vs. Curtis it was held, that equity will give relief beyond that which the party could obtain at law, if the recovery of the demand has been unconscientiously obstructed. On recurring to the bill, the complainant charges the fraudulent altering of the map, under which the dedication and the sale of the lots was made. It also charges that the appellees are seeking to make fraudulent use of it, against any remedies of the appellees against them, and prays it may be suppressed, and they restrained from using it. This map, as we have seen, might be unconscientiously used against the appellees on the issue of mala fide possession at law for mesne profits, hence the necessity of relief against it. The bill shows a *prima facie* right to the discovery and relief sought respecting this map. That being the case, it is settled that the Court of Chancery, where the claim is for an account of rents and profits, may finally settle the whole merits of the cause. Elliott vs. Armstrong, 4 Blackford, 423; Dormer vs. Fortescue, 3 Atkins, 132. The bill further states that the company are non-residents; that there is property of the company in the hands of persons therein named, who are Receivers of the Court of Chancery, and that the company have no other property within the

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State; that the Court of Chancery has undertaken the trust which belonged to the company, and as there is nothing to give jurisdiction to a Court of Law, they are compelled to come into Chancery. That the decree under which the Receivers are appointed, and the Court of Chancery, have taken all their property into the registry of the Court, was a consent decree, that therefore, their recovery in law has been unconscientiously obstructed.

Upon the face of the bill, therefore, there is, we think, a *prima facie* case made out for the jurisdiction of a Court of Chancery—sufficient at least until the answer comes in. It is also contended by the counsel for appellee, that the claim of the appellants for mesne profits is barred by the statute of limitations.

The rule is that where the face of a bill of Chancery shows a case barred by the statute of limitations, and no circumstances are stated which take the case out of the operation of the act, the defendant may take advantage of it by demurrer, and is not bound to plead or answer. *Rhode Island vs. Mass.*, 15 Peters, 236. Whether the appellant files his claim for any profits antecedent the demise laid in the declaration of ejectment, the bill does not advise us. The bill is not very clear and expressive as to the time for which mesne profits are claimed. Whether a claim which is a real action and is a necessary consequence of a recovery in ejectment and the judgment conclusive, is within the operation of the statute of limitations, we do not undertake to decide, nor can we say the face of the bill shows a case barred by the statute.

There are circumstances stated which are undenied, and which, for the purpose of this application for injunction, make out a *prima facie* case out of the operation of the act.

It is urged that this application for an injunction, if grant-

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ed, will have the effect of arresting the execution of a decree of the Court of Chancery. What the provisions of that decree are, the bill does not advise us. It is charged to have been a consent decree, as the bill says "there has been an agreement for the distribution of these proceeds amongst certain parties therein named," &c. In order to arrest the execution of a decree, it must of course be shown that the applicant has a prior right which he has not lost by laches, and it follows that any one having a right prior to the applicant, should not have the right disturbed. There is nothing in the bill to show what the rights of any of the parties to the decree are, unless it is that of Andrew S. Garr. He seems to have been vigilant. Whether he has been paid, or whether there has been any distribution, we are not told. The bill, however, alleges that "the land has been entirely sold under the direction of the Receiver, and in whose hands and possession are the notes, bonds, cash, &c., received for and on account of said lands." It would not, we think, be justice on this application to restrain the recovery of those creditors of said Company who have been vigilant, and by their diligence substantiated their demands against the company, and are only waiting the collection of assets to receive their pay, but if there is any thing in the hands of the Receivers over and above such established debts, that would be a proper fund or choses in action to be restrained from passing into the hands of others until the further order of the Chancellor.

In consideration of the merits as disclosed in the bill, we think the court below erred in denying an injunction. The cause is therefore remanded back to the Circuit Court, with instructions to grant an injunction until the further order of that court, enjoining any surplus money or transfer of any notes, bonds, choses in action, &c., or proceeds of any notes, bonds, &c., received for and on account of said lands, re-

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maining in the hands of the Receiver, after payment of claims of creditors who have established their claim and obtained a decree for the payment of the same.

As to whether attorney's fees, moneys expended in law suits, &c., can and should be allowed in this bill against the late occupant of said premises for mesne profits, this court does not now undertake to decide.

JOHN G. POWELL, ADMINISTRATOR OF SIMON PARTRIDGE, DECEASED, VS. THOMAS K. LEONARD.

1. Delivery of the thing donated is essential to the perfection of the gift whether it be made *inter vivos* or *causa mortis*.
2. To determine the sufficiency of a delivery, reference must be had as well to the *nature* of the property as to its *locality*.
2. Acts which would be insufficient to constitute a good delivery of inanimate or, unintelligent property, might, under the accompanying circumstances, be deemed altogether sufficient to perfect the delivery of a slave possessed of understanding and volition.
4. Where a female slave is in the chamber of her master, who is lying *in extremis* and he directs a deed to be drawn up, giving her and her children to a person present at the time, this is a good delivery *causa mortis* of the mother and her children, though the children were absent from the chamber at the time of the gift.
5. And the fact that the mother and children continued to remain at the residence of their former master for a short time after his decease, which occurred within a few hours after the execution of the deed, did not operate to defeat the gift.

This case was decided at Tallahassee.

The facts in the case are set forth in the opinion of the Court.

R. B. Hilton and *J. B. Galbraith* for appellant.

Papy & Archer for appellees.

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DUPONT, C. J., delivered the opinion of the court.

This cause was instituted on the equity side of the Circuit Court of the Middle Circuit, and was heard and determined by the Hon. J. Wayles Baker, the Judge of said court. The bill was filed by the appellant against the appellee, and the cause coming on to be heard upon demurrer, a decree was pronounced ordering the bill to be dismissed. From that decree this appeal has been taken.

The only question submitted for our adjudication, which it is material to consider, is whether the conveyance of the property as set forth in the bill can be sustained as a voluntary "gift," either "*inter vivos*" or "*causa mortis*." The question of delivery being the only one contested in this investigation, we are relieved from a discussion of the attributes of a voluntary gift, and the numerous perplexing questions which are found in the reported cases touching the rights of creditors and the claims of legatees. In this case it is admitted that there are no creditors to contest, and the decedent dying intestate, there arises no question of conflict as to legacies.

It is insisted for the appellant that whether the conveyance be considered in the light of a gift "*inter vivos*" or "*causa mortis*," the intention of the donor was never consummated; actual delivery of the property being essential and indispensable to the perfection of the title. In this respect we know of no difference between the two kinds of gifts and the position assumed must be taken as admitted law. Blackstone says: "A true and proper gift or grant is always accompanied with delivery of possession, and takes effect immediately, as if A gives to B £100 or a flock of sheep, and puts him in possession of them directly, it is then a gift executed in the donee; and it is not in the donor's

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power to retract it, though he did it without any consideration or recompense, unless it be prejudicial to creditors, or the donor were under any legal incapacity, as infancy, coverture, duress, or the like; or if he were drawn in, circumvented or imposed upon by false pretences, ebriety or surprise. But if the gift does not take effect by delivery of immediate possession, it is then not properly a gift, but a contract, and this man cannot be compelled to perform but upon good and sufficient consideration.”—2 Black. Com., 442.

In speaking of a donation “*causa mortis*,” the same author says—“that is, when a person in his last sickness, apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods, to keep in case of his decease. This gift, if the donor dies, needs not the assent of his executor; yet it shall not prevail against creditors; and is accompanied with this implied trust, that if the donor live, the property thereof shall revert to himself, being only given in contemplation of death, or “*causa mortis*.”—Ib. 514.

It will thus be seen that whether the gift be considered as “*inter vivos*” or “*causa mortis*,” a delivery of the possession constitutes the chief element of title, and is indispensable to the perfection thereof. What shall constitute a good delivery is a question of much greater difficulty, and is often attended with much perplexity. Its proper solution can only be arrived at by considering, not only the locality of the property, but also its nature and kind. As to the locality of the thing donated, it is not always practicable to make an actual tradition of the thing itself, and hence the delivery of a written conveyance, as in the case of vessels at sea, or of the keys, as in the case of goods in a warehouse, or trunk, are sometimes resorted to as a proper mode of transfer, and have ever been held to be a sufficient delivery.

A distinction has been made in some of the reported cases

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between a *symbolical* delivery, and the delivery of the *means* of obtaining the possession; it being held that the former is not sufficient to pass the property, while the latter constitutes a good delivery. But there is manifestly a lack of accuracy in the use of terms to convey the idea intended, for the written conveyance and the key referred to in the cases above cited are as truly *symbols*, as they are the *means* of obtaining the possession of the thing. The real difference, and one growing out of the nature of the thing itself, is between a transfer executed and one only executory, as in the case of a promissory note payable to bearer, and of one payable to order. In the former case, the gift is considered executed, and therefore good, because there is a perfect transfer of the debt and the means of recovery by the donee himself; whereas in the latter case, it requires the interposition of the donor, or in the case of death, of his legal representative, and consequently must have his assent.

Again, in considering what acts will constitute a sufficient delivery, reference ought to be had to the nature of the property or thing intended to be donated, for it is quite obvious that what might be esteemed a good delivery in the case of wild cattle or horses in the range, which might never be recovered by the donee, for the want of ability to control and reduce them to actual possession, might not be deemed sufficient in the case of inanimate articles, such as boxes or bales of merchandise or other articles.

And here again by analogy, there would seem to be a very wide difference between the acts which will constitute a delivery of animals as property, which have no volition or understanding, and such as possess these attributes. If a man *in extremis* were to declare to his dog or his favorite horse that he had given him to his intimate friend, and thereupon simply ordered him to repair to the residence of the intended donee, it would scarcely be seriously contended that these

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acts were such as would support a gift. And yet such declaration and command might be of most potent significance if addressed to one possessed of volition and understanding, as a slave for instance, and capable of not only comprehending but of carrying out the behest of the donor. Suppose for instance that a man *in extremis* or otherwise, intending to make a gift of a slave to a son or daughter, not being a member of his household, should execute a proper deed for that purpose, and dispatch the slave with it to the intended donee, and before the arrival of the slave, or the delivery of the deed, the donor should suddenly die, can it be doubted but that the gift would be held to have been perfected by such delivery, so as to bar the title of the legal representative of the donor?

Applying these principles to the case at bar, I now proceed to consider the facts as set forth in the bill, and which are admitted by the demurrer. The essential details so set forth are as follows, to wit:

“That the said Simon Partridge,” (the intestate of the appellant) “being in his last illness, was attended by the said Leonard (the appellee) as his physician; that a few hours before the death of the said Partridge, the slave Ann above mentioned came into the room where he was, and in the presence of witnesses, told her master that she had selected Dr. Leonard for her future master; that thereupon said Partridge, who was fully aware of approaching death, directed a bill of sale or conveyance of said slaves, (Ann and the others above mentioned,) to be drawn up, which was accordingly done by the said Leonard, and the said Partridge being too feeble to write his signature, one of the witnesses present guided his hand so as to affix his mark to said conveyance.” “That the said slaves above specified were not present so as to be identified by any of the witnesses present at the above transaction.” “That the said slaves remained

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on the place until sometime after the death of Partridge, when Leonard came and wrongfully took them away.”

The bill also gives the following description of the slaves enumerated in the deed, and above referred to, viz: “A woman named Ann, a mulatto about thirty years of age; Arthur, son of Ann, a boy about three years old, a mulatto; a yellow girl, child of Ann, about one year old, name unknown; a negro girl named Milly, about ten years old, a daughter of Ann; and yellow Harriet, a girl about eight years old, daughter of Ann.”

From this description it will be noted that the slaves constituted one family, embracing the mother and her children, ranging in age from ten years to one.

Adverting to the incidents of the transaction, so circumstantially detailed, the impression is at once made that these slaves constituted a family of favorite servants, for whose welfare and happiness it was the earnest desire of their master to provide, as the last act of his life. The conclusion is also irresistible, that this desire had been previously communicated to these beneficiaries, and that the transfer to Dr. Leonard was only in execution of that design. We here behold the master *in extremis*, and perfectly conscious of his approaching dissolution; he is accosted by the mother of these children, all of whom are of tender age, and in the presence of witnesses, she informs him that she had selected Dr. Leonard for her future master. A deed of conveyance is drawn up, embracing the mother and her four children, and is duly signed by the donor, who dies in the space of a few hours afterwards. No fraud is alleged—no undue influence is intimated, but the transaction takes place in the light of day, and in the presence of unimpeached witnesses. The motive and design of the donor were certainly highly commendable, and his benevolent intention ought not to be defeated, if it can be consummated without doing violence

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to the strict rules of law. We believe that this may be done. Whatever may be said of the absence and want of identity of the children, it is very certain that the argument does not apply to Ann, their mother. The statement of the bill is, that it was upon her personal application to her dying master that the gift was made, and it is a legitimate presumption that she was present at the very time that the deed was executed, which includes the names of her children.—Was anything more necessary to be done, to perfect the gift as to her? and if perfected as to the mother, shall it be held to be void as to the children? We think not. All the circumstances being taken together, we think that in this case the delivery of the mother was a sufficient delivery of the children. Adverting to the difference between slaves and all other kinds of property, in point of volition and understanding, the English adjudications afford us no safe guidance on this subject.

But it was further insisted for the appellant, that the remaining of the slaves on the plantation of the donor, after his decease, was sufficient to negative the fact of a sufficient delivery. Whatever influence this circumstance might have had upon a gift *inter vivos*, in the circumstances of this case, we are disposed to attribute to it very little importance. The statement of the bill upon this point is, “that the said slaves remained on the place until *sometime* after the death of Partridge.” How long a time they remained, we have no information—it might have been a day or a year. And taking into consideration the fact, that the donor died within a few hours after signing the deed, and that there was consequently no space allowed for the *locus penitentiae*, we deem the circumstance wholly immaterial.

The argument was also pressed with much force, that in sustaining this transaction as a *donatio causa mortis*, the

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policy of the statute regulating the execution of wills might be seriously disturbed. We have given due consideration to the argument, but have been unable to appreciate its force. Fraud and imposition might be perpetrated as easily in the one case as in the other, and the mere difference in the *number* of witnesses required is deemed but of little importance, if a fraudulent design is contemplated.

Upon full consideration of all the facts of this case, and the law bearing thereon, we are of the opinion that the decree of the court below should stand.

It is therefore ordered and adjudged that the decree of the Chancellor, ordering the bill filed in this case to be dismissed, be and the same is hereby *affirmed*, with costs.

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BALTZELL AND CHAPMAN, APPELLANTS, VS. THOMAS P. RANDOLPH, APPELLEE.

1. Relief will be granted in equity against a judgment at law when the defence could not *at the time, or under the circumstances*, be made available at law, *without any laches of the party*.
2. So, if a fact material to the merits *should be discovered after a trial*, which could not, *by ordinary diligence*, have been discovered before, the like relief will be granted.

This case was decided at Tallahassee.

The facts of the case are sufficiently stated in the opinion of the court.

Thomas Baltzell, for appellants.

The excuse that complainant was prevented through ignorance of the facts from making his defence at law, is disproved by the allegations of his bill asserting "that *since*

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the bringing of the said suit, he has discovered," &c. And again: "a short time previous to the term at which said judgment was rendered, your orator understood that the suit was brought on a contract not made by your orator at all, or by the firm of which he was a member."

It is more completely disproved by the four pleas filed in the suit, one of them asserting that there was no contract to which there was issue joined, and the three others demurred to, all of them withdrawn by defendant, and judgment allowed to go by confession.

In like manner the allegation that it was not his contract or that of the firm of which he was a member, is disproved by the distinct admission of the bill, "that the original draft, as drawn by the old firm of C. M. Harris & Co., became *due shortly after your orator and the said Harris became partners*, and by some arrangement between the said B. and C. and the said Harris, the said draft was *renewed by said Harris* in the same manner as the original draft, to wit: *in the name of C. M. Harris & Co.*" "It was understood by the parties that it was intended for the old firm, and the parties taking the draft received it as the paper, not of your orator and said Harris, but as the paper of said Lines & Harris" (the old firm of C. M. Harris & Co.) "During the existence of the first firm, he, Harris, contracted the debt," &c.

The defendants, B. & C., deny the allegations of the bill, insist that they were purchasers of the note as negotiable paper for a fair consideration, and require proof of the allegations of the bill.

Harris objected to as a witness incompetent to impeach his own act—deposing that "he does not recollect the date of the note, or whether Mr. Randolph was a partner at the time it was given in lieu of the draft, and had no means of ascertaining it; says that he was associated with Lines until his death in 1850, after which he continued business without

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any partner until August, 1851, when T. P. Randolph associated with me, and we continued business until November or December of the same year.”

The note sued on is dated October 17th, 1852.

If credit be given to this statement of Harris, the note sued on was made by him ten months after the dissolution of the partnership, which would involve him as having committed the heinous crime of making a partnership note when there was no firm. He states that he does not recollect in this respect, so that his statement should be rejected entirely, the more so as it is directly opposed to the admission of the bill, that the note was given during the partnership of Randolph & Harris. Nor does the statement of this same witness, that “the transaction *originating the draft* was had by me before Mr. Randolph associated with me,” conflict with that of Randolph & Harris making it. This refers to a draft accepted by C. M. Harris & Co., dated 17th April, 1852, and given to the same party, and not to the note on which judgment was rendered. The witness says nothing as to any agreement of the parties that the note was taken, not as the paper of Randolph & Harris, but of Harris & Lines.

Such is the case—such are the allegations—such the proof on which the judgment of one of the Superior Courts of the country is asked to be set aside—the main allegations of the bill distinctly admitted and proved by it to be false and untrue. Complainant could not make defence through ignorance of the facts before judgment. He did know them before judgment—he made defence by filing pleas—he did not make the contract at all nor the firm of which he was a member. They did make it, but with an agreement that another firm and not themselves were to be bound. Plaintiff’s witness shows that no firm made it, although he signed the notes as a partnership transaction. What decree can be made upon a bill contradicting itself in its main and important al-

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legations, or upon proof contradictory of itself and of the allegations of the bill? If courts of justice do not respect, uphold and maintain their own judgments, who else may be expected to do it? If, upon such pretext and under such circumstances, this judgment may be set aside, what one is safe even after full trial?

That Randolph was incompetent as a witness. 3 Howard Sup. Ct.

That he incapacitated himself. Greeley, 333; 2 Chitty Ev., 924*n*.

There is no proof of other allegations in the bill of the infancy, youth, inexperience, &c., of complainant; they are therefore not noticed.

D. P. Hogue for appellee.

WALKER, J., delivered the opinion of the court.

At the Fall Term of 1854, of Gadsden Circuit Court, appellants obtained judgment vs. appellee, for \$655.37, and on 28th December, 1854, execution was issued and being levied on the property of the appellee, the bill in this case was filed for an injunction, which being granted and made perpetual, appellants brought the case to this court.

In determining whether the Circuit Court erred in granting and perpetuating the injunction, two questions are to be considered. First, whether the equity of the case is with appellee; and second, whether he has not by his negligence lost his right to come into equity.

It appears from the testimony of C. M. Harris, the only witness examined in this cause, that the judgment is based on a note signed "C. M. Harris & Co.," but that appellee was not at the time said note was made, and had not been for near a year prior to that time, a member of said firm of "C. M. Harris & Co.," and, moreover, that appellee had no con-

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nection whatever with the debt said note was given to secure, said debt being the individual debt of said C. M. Harris, contracted by him before his partnership with appellee, and in which appellee had no interest, and for which he never in any way rendered himself responsible. From this evidence we have no difficulty in concluding that the equity of the case is clearly with appellee.

But why did not appellee set up these facts as a defence against the suit at law? In failing to do so, has he not been guilty of such negligence as will deprive a Court of Equity of the power to give him relief?

The rule on this subject as laid down by Judge Story, and supported by all the authorities, is as follows:

“Relief will be granted when the defence could not, *at the time*, or *under the circumstances*, be made available at law, *without any laches of the party*. Thus, for instance, if a party should recover a judgment for a debt, and the defendant should afterwards find a receipt under the plaintiff’s own hand for the very money in question, the defendant, when there was no laches on his part, would be relieved by a perpetual injunction in equity. So, if a fact material to the merits should be *discovered after a trial*, which could not *by ordinary diligence* have been ascertained before, the like relief would be granted.”—See 2 Story’s Equity, 894.

Adopting this as the true rule, let us see whether defendant could not, *at the time*, or *under the circumstances*, *without any laches on his part*, have availed himself of the defence as now disclosed by the testimony of Harris; or whether, *after the judgment*, he has discovered any fact *material to the merits*, which he could not, *by ordinary diligence*, have ascertained before the judgment.

The appellee in his bill says: “Your orator further states that the reason of his not availing himself of this defence at law, was owing to his entire ignorance, *at the time*, of any

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of the foregoing facts;" and again: "your orator could not ascertain, until after the judgment, what were the real facts in the case."

He of course could not avail himself of a defence of which he was at the time entirely ignorant, but the question recurs, was this entire ignorance "without any laches on his part," and might he not, "by ordinary diligence," have informed himself? To answer these questions, it will be necessary for us to review all the facts and circumstances disclosed by the record.

It appears that in August, 1851, appellee being then "very young and inexperienced in business," formed a co-partnership with C. M. Harris, at Chattahoochee, Fla., under the name, style and firm of "C. M. Harris & Co." This partnership lasted only a few months; when it was dissolved, and appellee withdrew from the business, leaving all its assets in the hands of Harris, and commenced business in Tallahassee in his own name. Whilst residing in Tallahassee, suit was commenced against him and Harris in Gadsden county, on 22d February, 1854. He acknowledged service of the writ, which was sent to him in Leon county on February 25, 1854. The declaration was filed in Gadsden county on 6th March, 1854, with a copy of the note sued on, which was a note for \$603.95, dated October 17, 1852, and signed "C. M. Harris & Co."

While it is certainly the duty of every defendant, so soon as he shall be served with process, to look at once and closely to his defences, yet there may be circumstances so well calculated to lull him into repose that it would be inequitable to make him suffer for yielding in some measure to their influence. What was the reasonable conclusion to which the mind of appellee might arrive on finding himself sued as a member of the firm of "C. M. Harris & Co."? We think he might, without blame, have concluded that said suit was

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brought on some legitimate demand against said firm, and, inasmuch as he had left all the assets of the concern in the hands of Harris, who resided in the county where the suit was brought, that said Harris would attend to it. Under this delusion, the appellee seems to have labored until "*a short time* before the term of the court at which said judgment was rendered," when he says he "*understood*" (by which we understand from other parts of his bill that he means he *suspected*,) "that said suit was brought upon a contract not made by him or by the firm of which he had been a member."

Thus suddenly aroused from a state of lethargy into which under the circumstances of the case, we cannot condemn him for having indulged, the appellee found himself hedged round by difficulties in the way of getting correct information how to construct his defence, and evidence to sustain it. He had no access to the books. Harris, who had repeatedly put him off by telling him that all should be so managed that he should not be damaged, was then lying sick at Chat-tahoochee, so that no information could be obtained from him, and the confidential clerk of the firm had departed to some place unknown. It is difficult to say what the appellee could have done under the circumstances. He seems, however, not to have become entirely inactive. He filed several pleas, but what they were we can only conjecture from the replication and demurrer to them, which appear in the record, though the pleas themselves do not appear.

The same cause which prevented appellee from making his defence at law, also prevented him from being able to make the affidavit required for a continuance or for a new trial. He was ignorant of the facts, and knew not where he could find a witness to prove them. It was urged in argument that he might have examined General Milton, but it does not appear that Gen. Milton knew then, or even now

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knows the facts of the case. It was also suggested that he might have obtained by bill a discovery from Harris, but Harris being a party to the record, his testimony could not be made available at law. Nor could appellee file a bill for injunction, being unable at that time to swear to such facts in his bill as would entitle him to an injunction. Being thus powerless to defend himself, appellee withdrew his pleas and suffered judgment by default. Having done so under the circumstances hereinbefore stated, and having now produced before this court conclusive evidence that he does not owe and never did owe any part of the debt for which judgment was rendered against him, we are of the opinion that he is entitled to the relief for which he prays.

Therefore let the decree of the Circuit Court be affirmed with costs.

Forward, J. While I concur with the majority of the court in the rule of law laid down by them, and also agree that were the appellee entitled to the relief he asks, the evidence would be sufficient; yet I do not think the facts as disclosed in the bill show that the appellee could not, by proper vigilance, have protected himself from injury in the suit at law.

Thomas Baltzell, counsel for appellants, filed a petition for a rehearing, which was refused.

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DANIEL HARTLEY, APPELLANT, VS. LAWRENCE J. FERRELL,
APPELLEE.

1. The rule that a plaintiff in ejectment must rely upon the strength of his own title, and not upon the weakness of his adversary's title, is not to be understood as requiring that he shall be compelled, in the first instance, to trace his title back to the original grantor; but only that he shall exhibit so much as will put the defendant to the support of his possession, by a title superior to one of a mere naked possession.
2. A plaintiff in ejectment is required, in the first instance, only to show a legal title, and a right of entry under it, in order to drive the defendant to the exhibition of a paramount title.
3. A purchaser at a Sheriff's sale has only to show his deed, the execution under which the land was sold, and prove title in the defendant in execution, *or possession since the rendition of the judgment* and the *onus probandi* is cast on the opposite party.
4. The fourth section of the Act of 1845, known as the "Married Woman's Law," is not in conflict with the *proviso* contained in the Act of 1835, which requires the private examination of the wife, when about to convey her separate real estate, and to be valid against her, the deed must be executed conformably to the requirements of that proviso.
5. Where in such case there was a private examination, but the written acknowledgment of the execution of the deed stated that it was done with "the intent of relinquishing her *right of dower*," these words will be rejected as surplusage, and the deed be held to be properly executed.

This case was decided at Tallahassee.

Appeal from Madison Circuit Court.

This was an action of ejectment instituted by the defendant in error to recover of the plaintiff in error the premises described in the declaration. The chain of title set forth by the plaintiff below was: first, a deed from the Sheriff of Madison county for the larger portion of said lands, and a United States patent, to one Sarah C. Scott; second, a deed executed by Sarah C. Scott and husband, conveying all of said lands to Lavinia C. Sellars; third, a deed from Lavinia C. Sellars and her husband, John W. Sellars, conveying said lands to the plaintiff below, Lawrence J. Ferrell. The other facts in the case are fully stated in the opinion of the court.

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William M. Peacock for appellant.

Pope & McDonald for appellee.

DUPONT, C. J., delivered the opinion of the court.

This was an action of ejectment, instituted in the Circuit Court of Madison county, by the defendant in error, to recover of the plaintiff in error the possession of certain premises described and set forth in the declaration.

At the trial of the cause, the plaintiff below offered in evidence, as a link in the chain of title, a Sheriff's deed for a portion of the land in controversy, which had been made in virtue of a judicial sale of the premises, as the property of one Holland, who was in possession at the time of the sale. The defendant's counsel objected to the introduction of this deed as evidence, unless it should be further shown that Holland, the defendant in the execution under which the sale was made also had title in himself. The court overruled the objection, and permitted the deed to go before the jury, unaccompanied by any proof of title in Holland, other than his having been in possession at the time of the sale. To this ruling the counsel of defendant excepted, and this constitutes the error first assigned.

It is undoubtedly true, as insisted by the counsel for appellant, that in an action of ejectment, the lessor of the plaintiff must recover upon the strength of his own title, and not through the weakness of the defendant's title. This is a canon of the common law, and its authority has never been questioned, however its application has been misunderstood. The application of this principle is not to be understood as requiring that a plaintiff in making out his title shall be compelled in the first instance to trace the chain back to the first grantor, but only that he shall exhibit so much as will put the

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defendant to the support of his possession, by a title superior to one of a mere naked possession. According to the bill of exception, it seems that the defendant made no exhibition of paper title, but was content to rely upon mere naked possession. It is, however, expressly stated that Holland, the defendant in the execution under which the land was sold, and by virtue of which sale the Sheriff's deed was made, was in the actual possession of the premises at the time of the sale, and consequently his possession must have been anterior to that of the defendant, and his title by possession also superior to the defendant's title by possession. Now it was only necessary for the plaintiff in the first instance, to trace back to that superior title, and as the defendant failed to exhibit a title paramount to that, we think that he had done enough to permit him to go to the jury.

The citation in the brief from 2 Greenleaf on Evidence, § 316, is not applicable to the point raised by the exception. That authority only maintains, that where the plaintiff claims under a Sheriff's deed, and the action is against a *stranger* to the execution by virtue of which the premises were sold, it is incumbent on the plaintiff, in order to sustain the deed to make due proof of the *judgment and execution*. This is not the point raised by the exception, and indeed we find no intimation in the record that the judgment and execution had not been fully proved.

The citation from Conference (N. C.) Reports, 527, would seem to sustain the exception taken in this case; but that is a very old case, and there is no citation of authority in the opinion, which is embraced in the compass of six or eight lines. In opposition to this authority, is the more recent case of "Whately vs. Newsom," (10 Geo. R. 74,) in which it is held that "a purchaser at a Sheriff's sale has only to show his deed, the execution under which the land was sold, and prove title in the defendant, *or possession since the rendition*

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of the judgment, and the *onus probandi* is cast upon the opposite party.” And this decision is in perfect consonance with the general rule that a plaintiff in ejectment is required, in the first instance, only to show a legal title and a right of entry under it, in order to drive the defendant to the exhibition of a paramount title. *Cooper vs. Galbraith*, 3 Wash. C. C. R. 546; *Tillery vs. Wilson*, 1 Overt. R. 236; *Wood vs. West*, 1 Black. R. 133; *West vs. Pine*, 4 Wash. C. C. R. 691; *Riddle vs. Murphy*, 1 S. & R. R. 230.

The second error assigned is in the following words, viz: “In ruling the dede of Lavinia Sellars and her husband to be sufficient, and valid, and good, without the private examination of the said woman, and allowing it to be read to the jury as evidence of title.”

The deed alluded to in this assignment is embraced in the record, and is sufficiently referred to in the bill of exception as matter of evidence adduced on the trial. We shall have occasion to refer to this deed more particularly hereafter.

It was argued for the defendant below that the premises embraced in the deed being the separate estate of the wife, she could not divest herself of the title but by submitting to a private examination apart from her husband, and that the act of 1845, commonly designated the “married woman’s law,” did not dispense with this formality. In order to have a proper comprehension of the point, we will recite the portions of the respective statutes bearing on the subject. The act of 1835, (Thomp. Dig. 179,) provides as follows:—“Any married woman, owning real estate of inheritance in this State, may sell, convey, transfer or mortgage the same, or any part thereof in the same manner as she might do, if she were sole and unmarried: *Provided*, the husband of said married woman join in such sale, conveyance, transfer or mortgage, and the same be made and authenticated in the manner prescribed by the several acts in force regulating

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conveyances of real estate, and the recording and authenticating the same: *And provided also*, that such married woman shall acknowledge, on a separate or private examination, before the officer or other person appointed by law to take her acknowledgment of her execution of any such sale, conveyance, transfer or mortgage, separate and apart from her said husband that she executed the same, freely, and without any fear or compulsion of her said husband."

It is worthy to be noted as a part of the judicial history of the State, that down to the date of this enactment, there was no mode provided by statute for the conveyance or transfer of the real estate of a *feme covert*, and they were consequently confined to the common law proceeding of *fine and recovery*, which proceeding not having been brought into use, and a large amount of such estates having been conveyed by the mere deed of the husband, or his simply joining with his wife, the second section of the same act was made to operate retroactively upon all such conveyances, and they were declared to be valid in law. For the benefits which have accrued from this act, the country is indebted to the Hon. B. A. Putnam, the present judge of the Eastern Judicial Circuit.

It will be seen that by the provisions of this act, the deed of a *feme covert* for the conveyance of real estate of inheritance was of no avail, unless the execution of the same were acknowledged by her, upon a private examination, separate and apart from her husband. So stood the law until the passage of the act of 1845, commonly called the "married woman's law." The 4th section of that act reads as follows, viz:

"The husband and wife shall join in all sales, transfers and conveyances of the property of the wife; and the real estate of the wife shall only be conveyed by the joint deed of the husband and wife, duly attested, authenticated and

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admitted to record, according to the laws of Florida regulating conveyances of real property.” (Thom. Dig. 221.)

Since the passage of this latter act, the question has been mooted by the bar, but never authoritatively decided, whether the *private examination* of the *feme*, requiredly by the provisions of the former act have not been dispensed with by the terms of this act? In support of the affirmative, it has been suggested that the *conformity* to the requisitions of the former act, which is directed by this act, reaches only to the “attestation, authentication and recordation;” and that the requirement was not designed to embrace the “execution” of the deed. We have given to this question the most patient investigation, and are constrained to hold that the section of the act of 1845, now under consideration does not in any manner conflict with the proviso contained in the Act of 1835, which requires the private examination and acknowledgment of the wife. To come to a different conclusion as to the intention of the Legislature, would be to impute to that body a gross act of stultification, in this, that while professing to enlarge the protection to be given to the rights of married women, they had, indeed, deprived them of their most valuable safe-guard, to-wit: protection against the undue influence of their husbands. But this interpretation of the act is not dependent alone upon its *spirit*; we think that the very *words* of the act are sufficiently comprehensive to indicate with certainty the intention of the Legislature. The words of this section are: “and the real estate of the wife shall only be conveyed by the joint deed of the husband and wife, *duly attested, authenticated and admitted to record, according to the laws of Florida regulating conveyances of real property.*” The question in this case is predicated upon the omission in this connection of the word “executed,” but we think that its force and effect is fully comprehended in the word “authen-

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ticated," especially as applied to the deed of a *feme covert*. To authenticate means to give *verity*, and thereby impart to the instrument its validity or operative effect. Now, until an ordinary deed has been *signed, sealed and delivered*, it is totally invalid as a deed. All these several acts must concur before it can be said to have been "executed" and capable of "authentication." So equally as to the deed of a married woman—it must not only be *signed, sealed and delivered*, but in addition thereto, its execution must be acknowledged upon a private examination, before it will be capable of authentication. From the very words of the statute, then, we conclude that there must be a conformity to the requisition contained in the proviso embraced in the act of 1835.

Having arrived at the conclusion that the private examination of the wife is necessary to give validity to the deed, whether made under the provisions of the act of 1835 or of 1845, we now proceed to the examination of the deed of Mrs. Sellars, the admission of which as evidence on the trial is the point of error now under consideration. There is no evidence in the deed itself that the premises intended to be conveyed was the separate property of the wife; but it is so stated in the bill of exceptions, and must therefore be taken as a fact admitted. The body of the instrument contains all the formalities and essential requirements of a valid deed, and is duly signed by both the wife and husband, in the presence of two witnesses. There is also attached to the deed the following acknowledgment and certificate:

"STATE OF FLORIDA, *Madison County*: Know all men by these presents, that I, Lavinia C. Sellars, wife of John Sellars, named in the foregoing deed of conveyance of real estate, to Lawrence T. Ferrell, do hereby acknowledge that I executed the same with the intent thereby to renounce,

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release, relinquish, and forever quit-claim, all my right, title and interest of dower, in and to the lands and tenements therein mentioned and expressed, and that the same was done freely and voluntarily, and without any compulsion, constraint, apprehension or fear of or from my said husband, or any other person.

“In witness whereof, I have hereunto set my hand and seal, this 12th day of November, A. D., 1859.

LAVINIA SELLARS, [L. s.]”

“Executed in presence of J. W. ANDERSON, SAMUEL F. SLOAN.”

“STATE OF FLORIDA, *Madison County*: Be it remembered that on this, the 12th day of November, in the year of our Lord one thousand eight hundred and fifty-nine, personally came before me, the subscriber, a Justice of the Peace in and for said county, Lavinia C. Sellars, wife of John W. Sellars, and separately and apart from her said husband made and executed the foregoing acknowledgment.

“In witness whereof I have hereunto set my hand and seal, the day and year first above written.

J. W. ANDERSON, [L. s.]

Justice of the Peace.”

The only objection made to the sufficiency of this private examination is that the interest acknowledged to have been assigned and intended to be transferred, is limited and confined to her “right of dower” in the premises. If the words “of dower” were stricken out, there could be no doubt as to the sufficiency of the acknowledgment. Shall these words be permitted to defeat the evident intention of the parties to the instrument? The execution of this acknowledgment was manifestly intended to convey some interest in the premises, or it was made in pursuance of a premeditated fraud. Mrs. Sellars had no *dower* interest; her only inter-

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est was in the *fee*. If the fee was not intended to be conveyed, then no interest was passed to the grantee, and the whole transaction bears the impress of an unmitigated attempt at fraud. We will not do this lady the injustice to put such a construction on her act; but will rather attribute the insertion of the word "dower" to the lack of information or inadvertence of the officer who made the examination. We think that the word may be discarded as *surplusage*, without doing violence to any principle of the law.

Having maturely considered the case as presented by the record, we are of opinion that there was no error in the rulings of the Judge below.

It is therefore ordered and adjudged that the judgment rendered in the Circuit Court be affirmed with costs.

ADELAIDE MAGEE *et als.*, vs. DOE, *ex dem.* CONSTANCE ALBA, AND OTHERS.

1. By making an act of Congress part of a special verdict of a jury (particularly where no objection to its admissibility in evidence appears in the record) the court will consider that the jury found all the facts stated and set forth in said act, whether the same were stated by way of inducement or otherwise.
2. The 8th Article of the Treaty of February 22d, 1819, between the United States and Spain, by which the Floridas were acquired, must be construed to stipulate expressly for the security to private property, which the laws and usages of nations would, without express stipulation, have conferred.
3. The operation of the said treaty as a *confirmation*, is the same upon a *purchase* of land of the Spanish government, before the date fixed in the treaty, as upon a grant made by the Spanish authorities previous to that time, which is to confirm such grant or purchase "*in presenti*," and the language of the Spanish side or Spanish copy of the treaty, is substantially adopted as the true reading, viz: that such grants "*shall stand or remain ratified and confirmed*," &c.

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4. Under the said treaty it was not contemplated that the Government of the United States should convey titles upon purchases made of Spain before 24th January, 1818, but only that the United States after a change of dominion, should respect such purchases as were made of the Spanish government before that time, and *ratify* and *confirm* the right which had, before that time, been acquired of the Spanish government.
5. The report and abstract or decision of the Board of Land Commissioners, appointed under the act of Congress, approved May 8th, 1822, entitled "An act for ascertaining claims and titles to lands within the Territory of Florida," in regard to claims and titles to lands in Florida, whether under grants from the Spanish government or by purchase from said government, are not final and cannot have the force of *res adjudicata*, nor deprive them of any right which they may have had previous to said report and abstract or decision. That the object for which these commissioners were appointed was to enable the government to *ascertain* the Spanish grants and sales, and their location, so that they might be separated from the public domain, and not sold as public lands. That for this purpose they "*constituted a board of inquiry, not a court exercising judicial power and deciding finally on titles.*" As to "Donation" claims—Quere?
6. It is inconsistent with all the acts of Congress and of our courts, in adjusting land titles derived from the Spanish government in Florida, prior to the date fixed by the treaty, to construe said acts in confirmation as a grant *de novo*.
7. The act of Congress, approved March 3, 1839, entitled "An act for the relief of the heirs and assignees of Peter Alba, deceased," (and made part of the special verdict in this case,) is *confirmatory* of the preexisting title of Peter Alba, Jr., ratifying and confirming the same, as by the treaty stipulation the government was bound to do; and by the "relinquishment of any title which the United States may have to said lots," in said act, Congress but authorizes the separation of the land from the public domain, in order that they may not be sold as public lands, and therefore is *not*, to any intents and purposes, a grant *de novo*.
8. The *ancient* rights and privileges of the husband and wife, as to property acquired during coverture, under the Spanish law in force in Florida at the exchange of flags, have been secured and have been acknowledged in our courts.
9. Those rights and privileges declared.
10. By the rules of descent in Florida *real estate* descends, where there are no children nor their descendants, to the father, *excepting* in cases where husband is heir of his wife.
11. A devise of "*all the rest and residue of my property and estate, real and personal, and of every kind and description whatsoever,*" embraces the corpus of the testator's property not otherwise disposed of.

Appeal from the Circuit Court of Escambia county.

This cause was argued at March Term, 1860, at Mari-

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ana; was held under advisement by the court, and by agreement of counsel the opinion of the court was delivered at Tallahassee at January Term, 1861.

Dillon Jordan, McClellan and Holland for appellants.

Richard L. Campbell for appellees.

FORWARD, J., delivered the opinion of the Court.

The appellees brought an action of ejectment in the Circuit Court, holden in and for the county of Escambia, to recover possession of the lots of land hereinafter described, situate and being in the city of Pensacola.

The jury empanelled to try the case brought in a special verdict, and judgment was rendered thereon in the court below for the appellees, (who were the plaintiffs,) on which the appellants, (who were the defendants,) brought their appeal to this court.

As appears by the record, the special verdict and judgment are in the following words, viz:

“We, the jury, find that Peter Alba, Jr., *claims to be the purchaser*, for a valuable consideration, from the Spanish government, in the year 1817, of the lots described in the plaintiff's declaration; that the said Peter Alba, Jr., presented *his claim* to the commissioners appointed under the act of Congress, approved May 8th, A. D. 1822, entitled ‘An act for ascertaining claims and titles to land within the Territory of Florida,’ and that the said commissioners, in their report and abstract K, reported to Congress that the *evidence* before them proved that the certificates of sale of the said lots was a *forgery*; that *prior* to the purchase of the said lots, the said Peter Alba, Jr., intermarried with the said Constance Alba, one of the lessors of the plaintiff; that in the year A. D. 1833, Peter Alba, Jr., departed this life

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without leaving any child or children; that Peter Alba, Sr., the father of the said Peter Alba, Jr., survived the latter; that the said Peter Alba, Sr., departed this life in the year 1836, leaving no lawful issue or decendants, and by his last will and testament, executed in due form to pass real estate under the laws of Florida, after several specific devises, in none of which were the said lots embraced, did, by the residuary clause of his said last will and testament, devise and bequeath, unto the said John Alba, (the illegitimate son of the said Peter Alba, Jr., and illegitimate grandson of the said Peter Alba, Sr.,) Virginia Alba, Angela Wilkins, wife of the said Joseph Wilkins, Peter Alba, Annette Alba, and Mary Louisa Alba, the lessors of the plaintiff, *all the rest and residue* of his property and estate, real and personal, and of every kind and description whatsoever; that at the date of the act of Congress of March 3d, A. D. 1839, entitled 'An act for the relief of the heirs and assignees of Peter Alba, deceased,' (which said act of congress is hereby incorporated into and made a part of this special verdict), the defendants, Adelaide MaGee, Drausin de Rocheblade, Delphine Jordan, wife of the said Charles N. Jordan, and Sophia Mason, wife of the said Felix G. Mason, were the sole heirs at law, then in being, of the said Peter Alba, Jr. And forasmuch as the jury is ignorant, in point of law, upon the foregoing facts, on which side they ought to find the issue, it is agreed that if the court shall be of the opinion that the plaintiff is not entitled in law to the said lots upon the foregoing facts, then they find the defendants not guilty of the trespass and ejectment in the plaintiff's declaration alleged; but, if on the other hand, the court shall be of the opinion, that the plaintiff is entitled to the whole, or any part of, or any interest in the said lots, in the said declaration set forth, then the jury finds the defendants guilty of the said trespass and ejectment, in the said declaration

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mentioned, to the extent to which the court may deem the said plaintiff entitled to the said lots, and in that event assess the damages of the said plaintiff at one dollar.

“And the court being of the opinion that the plaintiff is entitled to the whole of the premises in the declaration mentioned, to wit: Lots known in the plan of the city of Pensacola as numbers 342, 343, 344, 345, 346, 347, 327, 328, 335, 336, 337, therefore it is considered by the court that the plaintiff recover against the defendant his term yet to come in the lots of land aforesaid, together with his damages assessed as aforesaid, and his costs by him about his suit in this behalf expended, and that the sheriff of the county cause him to have his possession of his term aforesaid yet to come.”

The act of congress incorporated in, and made part of the special verdict, is as follows, viz:

“AN ACT FOR THE RELIEF OF THE HEIRS AND ASSIGNEES OF PETER ALBA, DECEASED.

“*Be it enacted, &c.*, That the title of the heirs of Peter Alba, late of Pensacola, in the Territory of Florida, deceased, or of such person or persons as by assignment from said Peter Alba may have claims thereto, to fifteen lots of land in the suburbs of the town of Pensacola, in the Territory of Florida, designated as follows, viz: numbers thirty, eighty-seven, three hundred and five, three hundred and twenty-one, three hundred and forty-two, three hundred and forty-three, three hundred and forty-four, three hundred and forty-five, three hundred and forty-six, three hundred and forty-seven, three hundred and twenty-seven, three hundred and thirty-five, three hundred and thirty-six, three hundred and thirty-seven, and three hundred and twenty-eight, *all of which were purchased* by the said Peter Alba, of the Spanish Government, in the year eighteen hundred and seventeen, be, and the same are hereby *confirmed*, res-

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pectively to their heirs of the said Peter Alba, or to his assignee or assignees, to whom he may have conveyed the same, or any part of said lots, in his life time, according to the right which the said heirs, or assignee, or assignees, may have thereto under the said Peter Alba: *Provided*, That this confirmation shall only extend to the relinquishment of any title which the United States may have to said lots.

“Approved March 3d, 1839.”

On the part of the appellees it is contended that the jury in said special verdict found the following facts, to wit:

1st. That Peter Alba, Jr., was the purchaser, for a valuable consideration, from the Spanish government, in 1817, of the said lots.

2nd. That at the time of the purchase of said lots, the said Constance Alba, one of the lessors of the plaintiff, was the wife, and is now the widow of said Peter Alba, Jr.

3d. That the said Peter Alba, Jr., in his life time, presented his claim or title to the Board of Land Commissioners, appointed under the act of Congress 8th May, 1822, and that said commissioners, in their report and abstract K, reported to Congress that the *evidence* before them proved that the certificates of sale of said lots were a *forgery*.

4. That in the year 1833, Peter Alba, Jr., departed this life without leaving any child or children.

5. That Peter Alba, Sr., the father of said Peter Alba, Jr., survived the latter.

6. That the said Peter Alba, Sr., departed this life in the year 1836, leaving no lawful issue or descendants, and by his last will and testament devised and bequeathed, unto the said John Alba, the illegitimate son of the said Peter Alba, Jr., to Virginia Alba, Angela Wilkins, wife of the said Joseph Wilkins, Peter Alba, Annette Alba, and Mary Louisa Alba, six of the lessors of the plaintiff, all the right and title of said Peter Alba, Sr., deceased, which he inherited as heir

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at law of Peter Alba, Jr., deceased, in and to said lots of land.

Upon this state of facts it is contended by the lessors of the plaintiff, that they have proved their title to said lots, and therefore the judgment of the court below should be affirmed.

On the part of the defendants it is claimed that the special verdict ascertained the fact to be, and the jury so found, that at the date of the act of Congress of March 3d, 1839, (which said act is made a part of the verdict,) the *defendants* were the sole heirs at law, then in being, of the said Peter Alba, Jr., upon which the appellants contend that the plaintiff in the court below ought not to recover on the demise of the lessors; and judgment of the court should be reversed on the following grounds, viz:

1st. Because there was no evidence before the court, by deed or otherwise, that Peter Alba, Jr., in his life time, had any title, legal or equitable, to the land in controversy.

2d. That the claim of Peter Alba, Jr., to these lots, was proved to be a forgery before the Board of Commissioners, and was therefore *rejected* by them; and that their decision is conclusive.

3d. That Peter Alba, Jr., having in his life time no title to these lots of land, they did not nor could not, upon his death, descend to his father, his then only surviving heir at law.

4th. That Peter Alba, Sr., having no title by descent, devise gift or purchase, to these lots of land, neither at the time he made his said last will and testament nor at the time of his death, they did not pass by the residuary clause in his said last will and testament to such of the lessors of the plaintiff as are named in said will.

5th. That as Peter Alba, Jr., had no title to these lots of land, neither during his life time nor at his death, his sur-

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viving wife, who is one of the lessors of the plaintiff, acquired no interest in the same by right of dower, or as a ganancial interest under the Spanish law.

6th. That the act of Congress of 1839, does not profess, neither could it invest Peter Alba, Jr., (then dead) with a title to these lots of land.

7th. That the act of Congress, being a confirmation by a law, is as fully, to all intents and purposes, a grant, as if it contained in terms a grant *de novo*.

8th. That the said act of Congress being a *grant*, and the claim of Peter Alba, Jr., having been declared a forgery, Congress therefore had a right to treat the lots as public domain, (which in fact they were,) and grant the same to persons capable of taking such grant.

9th. That as Peter Alba, Jr., had no title to the same at his death, the question of descent does not arise in this case, and therefore such of his heirs as acquired a right to these lots of land, under this act of Congress, acquire it by purchase and not by descent.

10th. That the will of Peter Alba, Sr., did not convey these lots by its residuary clause to these lessors, because he had not the title to them, neither at the time he made said will at the time of his death.

11th. That this act of Congress has therein named the grantees, to wit: "the heirs and assignees of Peter Alba," expressly excluding his widow, which must be construed to mean the "heirs and assignees" *then* living.

12th. That the dead cannot inherit nor take by deed or devise, confirmation or *relinquishment*, and the appellants who were the defendants in the Court below, being the only surviving heirs of Peter Alba at the date of the passage of this act of congress, they *alone* are entitled to the lots of land in controversy in this suit.

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It appears in the record that the tenants in possession entered into the common consent rule, made themselves defendants and plead the *general issue*.

The title of the real plaintiffs in ejectment was controverted, and if they recover, they must do so only on the strength of *their own* title; to do which they must prove that they had the *legal estate* in the premises at the time of the demise in the declaration; that they had also the *right of entry*, and that the defendants were in *possession* of the premises at the time when the declaration in ejectment was served. An exception to this rule is where both parties claim under the same third person. It is in such cases *prima facie* sufficient to prove the derivation of title from him, without proving his title.

The demises appear to be severally laid in the declaration in this cause, and the date thereof is the first day of March 1857. Lease entry and ouster seem confessed, at least not questioned.

The first and main question submitted for the consideration of the court is, do the facts in this case, as presented in the special verdict, show a legal title in the lessors of the plaintiff?

The deed or certificate of purchase from the Spanish Government to said Peter Alba, Junior, is not put in evidence. The only evidences of the title are recited in the special verdict, in which the jury found—

First, That Peter Alba, Jr., *claimed* to be the *purchaser*, for a valuable consideration, from the Spanish Government, in 1817, of the lots described in the declaration.

Secondly, The jury make the act of Congress of the 3d March, 1839, entitled "An Act for the relief of the heirs and assignees of Peter Alba, deceased," a part and portion of their verdict; and it is insisted that the declarations or admission in the act, (the admissibility of which it will be

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observed are not questioned by the parties,) together with the fact that Peter Alba, Jr., prior thereto, *claimed* to be a purchaser, for valuable consideration, of said lots, and that Congress was then acting on the said claim, are sufficient evidence of title.

This leads us to enquire, what is the effect of the jury making the said act of Congress a part of their verdict? We are of the opinion, that by making the act of Congress part of their verdict, particularly where no objection thereto appears in the record, the jury found *all the facts* stated and set forth in said act, whether the same were stated by way of inducement or otherwise.

Upon examination of the testimony contained in the said act of Congress, we find it is stated, after enumerating the lots of land, being the same described in the declaration in this case, that “all which *were purchased* by the said Peter Alba, of the Spanish Government, in the year eighteen hundred and seventeen;” which statement appears to us to be in clear and positive terms, that Peter Alba, junior, DID PURCHASE said lots of the Spanish Government in the year 1817. Add to this the further finding of the jury, to-wit: “That Peter Alba, junior, *claimed* to be the purchaser, for a “valuable consideration, from the Spanish Government, in “the year 1817, of the lots described in the plaintiff’s “declaration,” and we have conclusive evidence that Peter Alba, junior, did purchase these lots of the Spanish Government in the year A. D. 1817.

The evidence being that Peter Alba, junior, purchased these lots of the Spanish Government prior to the cession of the Province of West Florida to the United States, the question arises, What was the effect of the treaty with Spain on this purchase? Or in other words—whether these lots, at the exchange of flags, remained the property of Peter Alba, junior, or whether they became public lots of land,

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and passed to the public domain of the United States of America?

This is not a new question in our courts, although it may not have been decided by this court.

The Supreme Court of the United States, and the courts of Florida, have uniformly held, in construing the 8th article of the treaty of February 22nd, 1819, between the United States and Spain, so far as it is intended to protect or provide for the confirmation of private land grants made by the Spanish authorities in Florida previous to the 24th January, 1818, that the 8th article is to be considered as operating to confirm such grants "*in presenti*," and the language of the Spanish side or Spanish copy of the treaty is substantially adopted as the true reading, viz: That such grants "*shall stand or remain ratified and confirmed*," &c. U. S. vs. Arredondo and others, 6 Peters, 724 to 745; and U. S. vs. Percheman, 7 Peters, 86 to 89. The claim of Peter Alba, junior, being a *purchase* from the Spanish Government, is entitled to equal consideration, and the effect of the treaty in ratifying and confirming it is the same.

Suppose this *purchase* not to be within the express provisions of the treaty. The title of individuals would remain as valid under the new government as they were under the old; and those titles, at least so far as they were consummate, might be asserted in the courts of the United States. A cession of territory is never understood to be a cession of the property of the inhabitants. The King cedes that only which belongs to him; lands that he had previously sold were not his to cede; a *fortiori*, the cession of a territory should necessarily be understood to pass the *sovereignty only*, and not to interfere with private property. U. S. vs. Percheman, 87, Ch. Jus. Marshall, in this case of Percheman, page 88, says: "This article is apparently introduced

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“on the part of Spain, and must be intended to stipulate “expressly for that security to private property which the “laws and usages of nations would, without express stipulation, have conferred.”

We have here high authority that *purchases* from the Spanish Government are as “expressly” under the stipulation of the treaty as grants, and we have already seen that grants “*shall stand or remain ratified and confirmed,*” &c. We therefore hold that Alba, junior, in his life time, held by purchase these lots of land, at the exchange of flags, and that by the law of nations the right of property was protected, and by express treaty stipulation, the treaty itself operated as a confirmation, and therefore acquired and held, at his death, a legal title to said premises.

But say the Appellants, the claim of Peter Alba, junior, to be the purchaser for a valuable consideration from the Spanish Government, was not a good and valid one: it was *forgery*, and, therefore, would not have been ratified by the Spanish Government, and, therefore, should not be confirmed by the American Government. That in reality there was no purchase of the lots, by Alba, junior, and in consequence thereof, these lots of land were public lands, and Congress, by the Act of 1839, made a *grant* thereof to the heirs and assignees of Peter Alba, deceased.

There is no doubt that as between adverse claimants, under different titles, any admissions of the American Government would not be binding, and the appellants, claiming under an adverse title, might show that the conflicting claim was a *forgery*.

It will be observed that the pre-existing claim of Peter Alba, junior, that is to say “the certificates of sale” of the said lots, which are charged to be *forgery*, do not appear in evidence; and all the testimony in support of the *forgery*,

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is contained in the finding of the Jury, in their special verdict, which reads as follows, viz:

“That the said Peter Alba, junior, presented his claim to the commissioners appointed under the act of Congress, approved May 8, A. D. 1822, entitled An Act for ascertaining claims and titles to lands within the Territory of Florida, and that the said commissioners, in their report and abstract K, reported to Congress that the evidence before them proved that the certificates of sale of the said lots was a forgery.”

Upon this state of facts, we are asked to conclude that the certificates of sale, set up as the pre-existing claim of Peter Alba, junior, are a *forgery*, and that the act of 1839 is a donation to the heirs and assignees of Peter Alba, deceased, and was so intended by Congress.

To maintain this position of the appellants, we will have to declare that the Board of Land Commissioners before whom John Alba, Jr., presented his claim, was a judicial tribunal, and will have to give force of *res judicata* to their “*report*.”

This brings us to consider the nature and effect of the decision of this Board. And here again we can say that this is no new question. The courts of Louisiana, the Supreme Court of the United States, and the Circuit Court of Florida, have uniformly decided it.

In the case of Boatner vs. Ventress, 4 Condensed Reports of the Supreme Court of Louisiana, page 650, the court held that as to “donation claims in Florida,” the decisions of the Board were final, and could not be re-examined in a court of justice, upon the principle that the U. S. Government had the supreme right to dispose of its own property, in its own way; these donation claims being the gift of the U. S. Government.

But says the court, “If a legal title was vested in the

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claimants, under the Acts of Congress already cited, at any time previous to the decree of the Commissioners, it is very clear, that a decision by officers of the Government cannot have the force of *res judicata*, nor deprive them of any right which they may have had previous to such decision.”

So in this case, if Peter Alba, Jr., had a legal title vested in him, by the treaty already cited, at any time previous to the report of the Commissioners, their report cannot have the force of *res judicata*, &c.

The claim of Peter Alba, Jr., was not a *donation*, either of the Spanish or American Government; it was a *purchase* for a valuable consideration.

Again, in *United States vs. Percheman*, 7 Peters, 89, Chief Justice Marshall, in delivering the opinion of the court, uses the following language in speaking of and reviewing the Acts of Congress creating this Board of Land Commissioners, viz:

“It would seem from the title of the Act, and from the declaratory section, that the object for which these Commissioners were appointed was the ascertainment of these claims and titles. THAT THEY constituted a board of enquiry, not a court exercising Judicial power, and deciding finally on titles.” “It was necessary to ascertain these claims, and to ascertain their location, not to decide finally upon them.”

* * * * “From this view of the original act, it results, we think, that the object for which this board of Commissioners was appointed, was to examine into and report to Congress such claims as ought to be confirmed; and their refusal to report a claim for confirmation, whether expressed by the term ‘rejected’ or in any other manner, is not to be considered as a final judicial decision on the claim, binding the title of the party, but as a rejection for the purposes of the act.”

What were the purposes of the act? The Supreme

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Court, in the above Percheman case, gives the answer, which is: "*To obtain, with the utmost celerity, that information which ought to be preliminary to the sale of the public lands.*" That is to say: to enable the Government to *ascertain* the Spanish land grants, and sales, and their location—so that they might be *separated from the public domain*, and not sold as public lands.

Here, we think, we have a key to the Act of Congress of 1839. Congress in that Act declare, that Peter Alba did *purchase* of the Spanish Government, in 1817, said lots, &c. The Government here admits his pre-existing claim, the treaty confirms it, and this act of Congress authorizes the separation of the land from the public domain, by "*relinquishment of any title which the United States may have to said lots.*"

In conformity with the uniform decisions in this respect, we think it is very clear that the report or decision by said Board of Land Commissioners, as to the evidence of forgery, cannot have the force of *res judicata*, nor deprive Peter Alba, Jr., of any right to said lots which he may have had previous to said report. Accordingly we are driven to decide, that Peter Alba, Jr., in his life time, had a good and valid title, by purchase of the Spanish Government, to said lots, and that the same was *confirmed* to him by the treaty.

On the part of the appellants it is urged, that the Government by the act of Congress of 1839, disregarded the *prior claim* of Peter Alba, Jr., and by that act confirmed the lots in question to the *then* heirs and assignees of Peter Alba, Jr.; that this confirmation by this act is as fully, to all intents and purposes, a grant, as if it contained in terms a grant *de novo*.

We have already stated what we think the objects of Congress were in the passage of this act. The very language

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used in the act, which is patent upon the face thereof, precludes the idea that Congress *intended* a grant *de novo*.

But it may be urged that whatever the intention of Congress may have been, the *effect* of a confirmation, by act of Congress, is as fully to all intents and purposes a grant, as if it contained in terms a grant *de novo*.

The case of Strother vs. Lucas, 12 Peters, 412, does in words say and at first blush might be considered applicable to the case; but that case arose under the treaty by which Louisiana was ceded by France to the United States. The treaty by which Louisiana was acquired imposed only a *political* obligation upon the Government of the U. S. to perfect the titles, rights and claims originating under the former Government. The treaty itself did not, as in the case of the Florida purchase, operate as a confirmation. Chouteau vs. Eckhart, 2 Howard U. S. 345. There being only a political obligation in Louisiana, it may be that a confirmation by a law is a grant *de novo* there. Under the treaty by which Florida was purchased, it was not contemplated that the Government of the United States should convey titles upon purchases made of Spain before 1818, but only that the United States, after a change of dominion, should respect such purchases as were made of the Spanish Government before the time designated in the treaty, and *ratify* and *confirm* the rights which had before that time been acquired of the Spanish Government.

In this case, we are of the opinion, that the act of 1839 was confirmatory of the pre-existing title of Peter Alba, Jr., and that the heirs or assignees of Peter Alba, Jr., at his death, had the legal title in said estate.

This leads us to enquire who were the heirs or assignees of Peter Alba, Jr., at his death? who claim by derivative title? and particularly whether the lessors of the plaintiff

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in the court below had the legal estate in the premises at the time of the demise in the declaration, and whether they had also the right of entry, &c.

The verdict of the jury found the fact to be, that Constance Alba, one of the lessors of the plaintiff, was the wife of Peter Alba, Jr., at the time of his purchase of these lots of land of the Spanish Government, and that as the same were acquired during their marriage, the lots being an *onerous increase* or gain-come under the Spanish laws in force at that time in the Province of West Florida, into partition, and therefore that she is the legal owner of one undivided half of said lots.

This is not a new question either. The courts of Florida have frequently adjudicated upon these rights of husband and wife, under the Spanish law, and uniformly held, as laid down by Mr. White, in his new Recomplication, Vol. 1, page 61, that marriage, so far as property is considered, is to be considered in the light of a contract of partnership.

The right to *ganancias* is founded on the partnership or society which is supposed to exist between the husband and wife.

That *ganancial* property is all that which is increased or multiplied during marriage. By multiplied is understood all that is increased by *onerous* cause or title, and *not* that which is acquired by lucrative one, an inheritance, donation, &c. Says Mr. White:

“From all which is inferred, 1st. That what the husband or wife bring into marriage, as their own peculiar property, or acquire during it by lucrative cause or title, does not come into partition.

“2nd. But that the property acquired during marriage by purchase, sale, or other onerous cause or title, *does*.

“3rd. That immediately upon a division being made of

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this *ganancial* property, each acquires an absolute dominion as to their respective moieties or proportions.

“4th. That as the gains (*ganancias*) are common, so also are the injuries or damages which shall happen to them, unless they arise by the fault of only one of the partners.”

These rights and privileges of husband and wife have been secured by the Legislature of Florida.

See Thompson's Digest, page 220; *Saul vs. his creditors*, 5 Cond. Rep. Sup. Ct. Louisiana, page 663. This being the law governing the interest of Constance Alba, the wife and one of the lessors of the plaintiff, in these premises, it will be seen that she is not entitled directly to one half of the land, but being entitled to one half of the gains during the marriage, and lands purchased being considered *gains*, these lots come into partition, and upon a division being made, each would acquire absolute dominion. Without undertaking to decide what the extent of the interest may now exist as between the said Constance Alba and the remaining lessors of plaintiff in these lots, it is only sufficient for us to decide, that the Spanish law in force in this State, she has secured to her an interest in *common* with her late husband's heirs or heir, and that she has an interest in these lands, in connection with the derivative title through her husband, sufficient to make her joinder as one of the lessors of the plaintiff, proper and legal.

The special verdict found, that in the year A. D. 1833, Peter Alba, Jr., departed this life without leaving any child or children; that Peter Alba, Sr., the father of the said Peter Alba, Jr., survived the latter.

By the rules of descent which were in force in this State in the year 1833, *real estate* descends, where there are no children nor their descendants, to the father. By the act subsequently enacted, the husband is made heir of his wife.

This then ~~being~~ the law of inheritance, it follows that as

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Peter Alba, Jr., died intestate, having title to these lots, and left no child or children, nor the descendants of any children, and Peter Alba, Sr., his father, survived him, that therefore all right and title of Peter Alba, Jr., in and to said lots, became vested in his father.

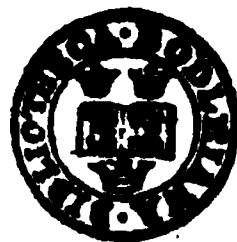
The special verdict further found, that the said Peter Alba, Sr., (the father) departed this life in the year A. D. 1836, leaving no lawful issue or descendants, and by the residuary clause of his said will, after several specific devises, in none of which were the said lots embraced, devised and bequeathed, unto all the lessors of the plaintiff, *excepting* Constance Alba, all the rest and residue of his property and estate, real and personal, and of every kind and description whatsoever.

Such a devise embraces the corpus of the testator's property, not otherwise disposed of. 2 Jarman on Wills, 132, 139.

We have already stated that the act of Congress of 3d March, 1839, which was passed after the death of Peter Alba, Sr., was confirmatory of the title of Peter Alba, Jr.; that is to say, it confirmed and ratified the purchase made from Spain before the treaty. It is argued that the devisees of Peter Alba, Jr., are not mentioned in the act of Congress. The answer to this is the intention of that act, and this *intention* is readily ascertained by enquiring what was the necessity of the passage of the act, and what the object to be gained by it, either to the government or any person or persons claiming its passage? We conceive the objects of the act were two fold:

First. To ascertain and declare whether Peter Alba, Jr., did purchase these lots of the Spanish Government, in the year 1817, as he claimed to have done.

Secondly. To confirm his title, so that the lands embraced therein might be recognized by the government as separated from the public domain.



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This is evident when we consider that when the *purchase* was ascertained, the treaty *confirmed* the title, and with this in view, we look at the proviso of the act, wherein it is stated, "THAT THIS CONFIRMATION SHALL ONLY *extend to the relinquishment of any title which the United States may have to said lots.*"

Relinquish it, to whom? To the person or persons claiming the confirmation. Who are claiming the confirmation? Those persons deriving title from the purchaser, (Peter Alba, Jr.) What title had the United States to relinquish? None, excepting the *separation* from the public domain, that is to say, the reservation of the lots from public sale, and a full recognition of these lots by the government as private property; and this we consider is all that Congress intended by this confirmatory act. This view of that act harmonizes with all the history of the government, respecting grants and purchases in Florida, prior to the date fixed by the treaty.

This act of Congress (which is made a part of the verdict,) declares that Peter Alba, Jr., *purchased* these lots of the Spanish Government. If he purchased them, (and the appellants have not shown that he did not,) then he held such an interest in these lots as would and did, at the time of his death, descend by the statute of descent or distribution to such person or persons as would at his death have answered to the description of his heir or heirs at law.—We cannot see by what authority Congress could have passed an act subsequent to this death of Peter Alba, Jr., which would change the legal color of descent and distributions, so as to give the property to such persons as might, in 1839, when the act was passed, answer the description of his heirs.

To suppose Congress intended to act so inconsistent with all its obligations under the treaty, and in violation of vested

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rights, is coming to a conclusion not authorized by the wording and history of this act.

We conclude, then, that the appellees claiming under the purchase of Peter Alba, Jr., of the Spanish Government, whose claim was confirmed by operation of the said treaty, and subsequently ratified and confirmed by the said act of Congress, must prevail over the appellants who attempt to establish title under the said act of Congress alone.

The judgment of the Circuit Court is affirmed with costs.

EMILY L. DONALDSON, APPELLANT, VS. THE STATE.

The 8th section of the act of 5th Feb'y, 1834, was repealed as to East Florida with the exception of the county of Columbia, by the act of the 14th February, 1835.

This case was decided at Jacksonville.

S. L. Burritt for appellant.

Attorney General for the State.

Associate Justice FORWARD being absent, the Hon. J. WAYES BAKES, Judge of the Middle Circuit, sat in his stead, and pronounced the opinion of the court.

The defendant, Emily Donaldson, was indicted at the Spring Term of the Circuit Court for Duval county. The indictment contained two counts. The first charged that the defendant *received* grain from a slave, said slave not having a *permit* from the person having the control of said slave; the second, that the defendant *purchased* grain from a slave, not having such permit.

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To this indictment the defendant pleaded "*autrefors convict*," which being overruled by the court, she then pleaded "not guilty." Upon the last plea the defendant was tried at the October Term of said Court, 1859; but the jury failing to agree, they were by consent discharged, and on a subsequent day of the same term, the case was again tried by another jury upon the same plea, who returned into court a verdict of "guilty" against the defendant, with a recommendation to the clemency of the court; whereupon the court assessed a fine of twenty-five dollars against her, and entered up a judgment accordingly.

A motion for a new trial was made in the court below, which being overruled, the defendant appealed to this court.

The errors assigned are as follows:

1st. That the plea "*autrefors convict*," pleaded to said indictment, was a good plea and that the Circuit Court erred in overruling it.

2nd. The court erred in charging that the permit to a slave to sell or dispose of grain must be in writing.

3d. The court erred in addressing any remark to the juror, Adam Ochus, at the time when the said jury were being polled, touching the discrepancy or inconsistency between the sealed verdict and his declaration at the time that it was not his verdict, and especially in addressing any remarks indicating any displeasure or dissatisfaction on the part of the court, or which involved the said juror in the necessity of making any explanations.

The points presented by this assignment of errors were discussed by the learned counsel engaged in the cause, but the court deems it unnecessary to consider them, as the judgment must be reversed upon other grounds.

The defendant was indicted and convicted under the act passed the 5th February, 1834, approved 11th February, 1834. Thompson's Digest, p. 508, section 8.

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Parts of this act, including section 8, as numbered in Thompson's Digest, p. 508, were repealed by the act of the 14th February, 1835. See Thompson's Digest, p. 509, section 9. The act approved January 24th, 1851, amended the 3d section of the act of 1834, numbered in Thompson's Digest, section 8, but it will be seen by reference to the act of the 14th February, 1835, above referred to, that this section was not in force in any portion of East Florida except the county of Columbia. The statute under which the defendant was indicted and convicted having been repealed before the trial, the judgment of the court below must for that cause be reversed.

LUDOWICK WARROCK, APPELLANT, VS. THE STATE.

1. An assault and battery *with intent to kill*, is an offense not embraced in the criminal statutes of Florida, nor is it known to the common law of England.
2. Under the statute of this state, assault and battery, and assault with intent to kill, are offences of equal grade.
3. A person indicted for an assault with intent to kill, may if the evidence does not support it, be convicted of an *assault*, which is by statute made the only *minor* offence of a kindred character.
4. It is error for the jury, in this State, to find the defendant guilty of an assault and battery, under an indictment for an assault with intent to kill.

This case was decided at Jacksonville.

The Grand Jury brought into court and presented a bill of indictment against the said Warrock, endorsed on the back thereof, "Assault with intent to kill—a true bill." In the body of the indictment there were two counts, one of which reads as follows, viz:

"That Ludowick Warrock, late of the county of Duval, laborer, on the twenty-eighth day of May, in the year of our Lord one thousand eight hundred and fifty-nine, with force

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and arms, at the county aforesaid, in and upon one George C. Acosta, in the peace of God and the State of Florida, then and there being, unlawfully did make an assault, and him, the said George C. Acosta, then and there did beat, wound and ill-treat, with intent him, the said George C. Acosta, then and there to kill, contrary to the form of the statute," &c.

The second count was for an assault and battery upon said Acosta.

Before going to trial, the solicitor entered a nolle prosequi to the second count. The defendant in the court below then moved to squash the indictment, upon the ground that the offence charged was an assault and *battery* with intent to kill, and that no such offence is enumerated in the statute of Florida; and no such offence was and is known to the common law. The circuit court overruled the motion, the defendant plead not guilty, and the case went to trial on the *first* count in the indictment. The petit jury found the defendant guilty of simply an assault and battery.—Motion in arrest of judgment was made, which was overruled, and judgment entered up against the defendant. From this conviction, writ of error is sued out to this court, under the statute of 4th January, A. D. 1848.

Saml. L. Burritt for appellant.

Attorney General for the State.

FORWARD, J., delivered the opinion of the court.

The indictment in this case is founded upon a statute which enacts that "*any person convicted of false imprisonment, mayhem, assault and battery, or an assault with intent to kill, shall be punished by a fine not exceeding*

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one thousand dollars or imprisonment not exceeding six months, at the discretion of the jury; and any person convicted of a bare assault, shall be punished by a fine not exceeding one hundred dollars, at the discretion of the jury."

The first question presented in considering whether the conviction was right or wrong, involves the inquiry for what was the defendant in the court below indicted and tried, and how is this to be determined? Are the court to take the endorsement upon the indictment as fixing the offence, or are they to examine the record and scrutinize the express language of the indictment?

In the case of *Cherry vs. the State of Florida*, 6 Fla. Rep. page 680, this court held that in view of the practice of the Circuit Courts, the endorsement constituted no part of the indictment, and that "the finding must be taken to be general and referable solely to the offence *as charged in the body* of the indictment." This being considered the place of reference, we look to the body of the indictment, and we see that the offence charged in the count is for an assault and battery with intent to kill. It is in almost exact form of the indictment laid down in Archbold's Criminal Pleadings, page 416, with the superadded words, "with intent him, the said George C. Acosta, then and there to kill." Mr. Archbold, in speaking of the evidence for the prosecution under said form of indictment, says: "The present is an indictment for an attempt to commit a battery, and also for a battery actually committed." According to Archbold, then, the indictment in this case charges the offence to be an attempt to commit a battery with intent to kill, and also for a battery actually committed with intent to kill. The form of an indictment for assault *without* battery, will be found in Wharton's Precedents of Indictments, page 214, and as will be seen differs from the count in this indictment. So in the Circuit Court of the United States, in an indict-

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ment under an act of Congress for assault with intent to kill, it will be seen the practice is to frame the indictment for an assault with intent to kill, without charging a battery actually committed. See Wharton's Precedents, 239.

The errors assigned were that the conviction was erroneous because—

First, There was no such offence known to the statutes of Florida as an assault and battery with intent to kill, nor any such offence known to the common law of England.

Second, That if the indictment could be treated by the court and jury as an indictment for mere assault and battery, then the indictment was defective, as no name was placed upon it as a security for costs in case of an acquittal.

As will be seen by reference to the statute, no such an offence as an assault and battery with intent to kill is enacted. The statute, without employing any terms descriptive of the offences, but merely declares the punishment for false imprisonment, mayhem, an assault and battery, or an assault with intent to kill.

In the case of Hall vs. the State, decided at the last term held in Marianna, this court held that an "assault with intent to kill" is not an offence known to the common law, but by statute of this State is made misdemeanor—it is made a statutory offence, and as such punished. So we think all assault and battery with intent to kill, is not an offence known to the common law—wherever it exists, it is by statutory provision. Has any statute of this State created such an offence? We think not. We are therefore driven to the conclusion that there is no such offence in the criminal code of this State as assault and battery with intent to kill.

It is contended by the Attorney General that the averment of battery in this count of the indictment is but setting forth the means or manner of the assault, that is to say,

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that he assaulted him by beating, wounding and ill-treating him *with intent to kill*, which is an aggravated assault.

The indictment does not so aver, and the only way it could be sustained would be by considering it a double count, with visible averments. In either case, it would be an indictment for an assault with intent to kill. Let us suppose it a good indictment for assault with intent to kill, and it presents a case of greater difficulty.

The jury found the defendant, (Warrock,) guilty of assault and battery without the intent to kill. The proof did not, in their judgment, sustain the *quo animo* charged.

The defendant was therefore convicted of a different offence than that contained in the indictment, and the only ground upon which the conviction could be sustained is under the general rule, that whenever the defendant is charged with the major offence, and the evidence does not support it, the jury may convict of any minor offence of a kindred character, which is included in the major, and to which the testimony applies. This brings us to the enquiry whether assault and battery is a minor offence, and of lower grade in this State to an assault with an intent to kill?

Upon examining the statute it will conclusively appear, that assault and battery, and assault with intent to kill, are of equal grade, while a "bare assault" is made of lower grade, by providing, on conviction therefor, a lesser punishment. The other offences enumerated are equally punished and thus made of equal grade. Therefore, under the statute, assault and battery is not the minor offence embraced in assault with intent to kill, and the conviction was for an offence not included in the indictment.

An assault would have been a minor offence; and had the jury, under such an indictment, convicted him of an assault, it would have been under the said general rule a good conviction. The defendant having been indicted for an offence

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not known in this State, and there having been a conviction for an offence not included in the indictment, the erroneous conviction is tantamount to an acquittal. The court is of the opinion that there was error in the judgment of the court below. It is therefore ordered and adjudged that said judgment be reversed and the said Warrock discharged therefrom.

SAMUEL CRIBB, APPELLANT, VS. THE STATE.

1. Where all the counts in the indictment are good, and the jury return a general verdict of guilty, it is the true practice of the court, if the evidence and law warrants the conviction, to pass judgment on the count charging the highest grade of offence. But where the grades of offence in each count are equal, and there are good and bad counts in the indictment, the practice is to pass judgment on all the good counts, provided the conviction is warranted by the law and evidence applicable to the offence charged in that count.
2. A State being sovereign and independent, possesses inherent right and power over her resident citizens. Under this power she had a right to declare what is a public grievance, (*providing* such declaration does not conflict with the constitution or of any act of Congress passed within the scope of the constitutional power of Congress;) and prohibit one of her citizens residing within her jurisdiction (while he does thus reside,) from holding and exercising a *license* or office from a sister State or any foreign power.
3. The second section of the act of 1850, entitled "An act to be entitled an act to amend an act to regulate Pilotage at the port of Fernandina, in the County of Nassau and the port of Cedar Key, County of Levy," was not in violation of the constitution of the United States, nor of any law nor treaty made in pursuance or under the authority of the constitution.
4. The holding of a license to pilot by a resident of this State, from the authorities of the State of Georgia, is a statutory offence, and not an offence known to the common law: therefore as no penalty is prescribed in the act creating said offence, the remedy is not by indictment.
5. The of the several States for the regulation of pilots "are enacted by virtue of a power residing in the States to legislate," and are valid, unless such legislation interfere with, or is contrary to an act of Congress, passed in pursuance of the constitution.

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6. Congress having, by the passage of the act of March 2d, 1837, regulated pilotage in the port of Fernandina, situate upon waters which are the boundary between Florida and Georgia, the third section of the said act of 1859 is in conflict with the said act of Congress, and therefore unconstitutional.

This case was decided at Jacksnoville.

Appeal from the Circuit Court of Nassau county.

The opinion of the court contains a sufficient statement of the facts of the case.

Banks & McLeod and Smith & Ives for appellant.

Attorney General for defendant.

FORWARD, J., delivered the opinion of the Court.

The indictment in this cause contains four counts.

The first count charges that Samuel Cribb, late, &c., “*did conduct a certain vessel, to-wit: the schooner Five Boys, into the harbor of Fernandina, and that the said Samuel Cribb did not then have a license from the Commissioners of Pilotage for the port of Fernandina, contrary to the form of the statute,*” &c.

The second count that he did conduct “a certain vessel, to-wit, the schooner Five Boys, *out of the harbor of Fernandina, and that the said Samuel Cribb did not then have a license from the Commissioner of Pilotage for the port of Fernandina, contrary,*” &c.

The third count, that “*being then and there a person residing within the jurisdiction of the Commissioners of Pilotage for the port of Fernandina, with force and arms did hold a license as Pilot for the Bar of St. Marys from certain of the authorities of the State of Georgia, &c., the said Samuel Cribb, not then and there having a special license from the Commissioners of Pilotage for the port of Fernandina to hold said license from the said authorities of the State of Georgia, contrary,*” &c.

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The fourth, “that the said Samuel Cribb, &c., *being then and there a resident of the State of Florida, did, by virtue of license from certain of the authorities of the State of Georgia, &c., carry across the St. Mary’s bar a certain vessel, to-wit: the schooner Five Boys, contrary,*” &c.

The statute upon which the offences are founded, reads as follows:

“SEC. 2. *Be it further enacted,* That no pilot or other person residing within the jurisdiction of the Commissioners of Pilotage for the port of Fernandina, shall accept, hold or retain any license as a pilot for any portion of the bar, harbor or river of St. Marys, from the State of Georgia, or the authorities thereof, without a special license to that effect from the Commissioners of Pilotage for the port of Fernandina aforesaid.

“SEC. 3. *Be it further enacted,* That no person shall be authorized or permitted to conduct any vessel into or out of the harbor of Fernandina, unless such person shall have a license from the Commissioners of Pilotage for the port of Fernandina, and any person not having such license, or having forfeited or been deprived of the same, or any resident of the State of Florida who, by virtue of any license from the authorities of the State of Georgia, shall bring into or carry out of the harbor of Fernandina, or to any landing on the St. Marys river or *across the St. Marys bar*, any vessel, shall not only be entitled to no fee or reward for the same, but for any such offence may be indicted, and on conviction thereof shall be fined in the sum of five hundred dollars; provided,” &c.

The defendant plead not guilty, and on the trial the following evidence was adduced, viz:

“Henry Timanus sworn—Says he is chairman of the Board of Commissioners of Pilotage for the port of Fernandina, and has been ever since the organization of said board,

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which has been over three years. Knows that Cribb has had no license from said board, but does not know if he (Cribb) has a license from any other authority; understood that he claimed to act under a license from the authority of Georgia. Does not know positively that Cribb resides at Old Fernandina, but believes that he does, from having seen him (Cribb) often at and about Old Fernandina during the last three or four years, and Old Fernandina is in the State of Florida and Nassau county. There were other pilots at the port of Fernandina during the past two or three years—does not know where they obtained their license; knows that Cribb keeps a pilot boat at Fernandina, Florida. Some six or eight months ago, saw Cribb on board of a vessel coming into the harbor of Fernandina; he (Cribb) was acting as pilot; he (Cribb) was at the wheel of said vessel; has seen Cribb several times piloting vessels up to the harbor of Fernandina since the laws referred to were passed as well as before; does not know the name of the vessel on which he saw Cribb some six or eight months ago.”

Cross Examination.—“Does not know positively where Cribb resides, but believes that he has lived for four years at Old Fernandina, State of Florida, Nassau county; was not on the vessel which Cribb was piloting into the harbor of Fernandina some six or eight months since, but was near enough to recognize him (Cribb;) has seen him (Cribb) on several vessels, one of which was on Amelia river and one in Cumberland sound.”

“Abraham Eliler sworn—Knows Cribb, who has lived for six or seven years at Old Fernandina. During the present year, over one month ago, went out to board a vessel that was over the bar, which proved to be the schooner Five Boys, and the boat in which the witness was, was pulled up along side the vessel. Witness hailed and enquired where the vessel was bound, the answer was to Fernandina; then

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asked if they wanted a Florida pilot—received no answer. We then enquired for the captain, who came forward and said, ‘I am captain.’ We asked, do you want a Florida pilot? Captain said I do. We then pulled the boat alongside. On attempting to board said vessel, was told by Cribb, *who was on board* the said vessel, that there is a pilot on board, and Cribb’s attitude was menacing. He came to the side of the vessel with a stick in his hand, and threatened any one who should come on board. Witness then left the vessel and started in for the harbor of Fernandina, *the vessel following with a light breeze*; arrived in Fernandina some time before the vessel. Did not see Cribb bring the said vessel into the harbor of Fernandina. Does not know if Cribb had a license from Georgia. Witness is a Fernandina pilot. The vessel referred to *was not becalmed after witness left her*; the tide was running ebb.” Witness further stated that said vessel anchored in front of the town of Fernandina.

“*Cross Examination.*—Does not know if Cribb was on board the vessel referred to when she arrived at Fernandina. Cannot say whether he brought her over the bar or not.”

“J. Cardona sworn.—Knows Cribb; he has lived at Fernandina for fifteen years; he lived on the adjoining lot to witness. He (Cribb) did hold a license from St. Marys’ authorities. Went out with Eliler to board a vessel outside the bar; she proved to be the schooner ‘Five Boys.’ She was beating up to the bar; went alongside and hailed the vessel three times; asked for the master; the man on board said he was master. We then inquired if they wanted a Florida pilot; was answered that they did. I saw Cribb on board, who said there is a pilot on board. We attempted to board said vessel. Cribb came to side of the vessel with a stick in his hand, and was threatening any one who should

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come on board. We left the vessel and came in. Did not see Cribb bring the vessel into the harbor of Fernandina; do not know if he brought the vessel over the bar. As long as witness was in sight of said vessel, Cribb was on board. This was in April 1860. Cribb has a boat, but at the time above stated it was used for fishing. He (Cribb) did hold a license from Georgia up to a year ago; does not know that he holds it at this time.”

“F. Livingston sworn.—Am collector of the port of Fernandina. The schooner ‘Five Boys’ entered at said port on the 15th of April, 1860. Do not know if Cribb holds a license from Georgia.”

“T. T. Long sworn.—Have seen a license to Cribb from the authorities of Georgia; does not recollect who had it last; does not recollect the date; thinks it was signed by one individual as Commissioners of Pilotage; have heard Cribb say that he was commissioned by the authorities of St. Marys, Georgia.”

On this evidence the jury found defendant guilty generally.

Motion for arrest of judgment and new trial was made, which motion was overruled and judgment entered up against the said defendant.

From this conviction and judgment, a writ of error, as provided by statute, is sued out to this court.

The errors assigned are:

1st. That the Legislature of Florida transcended her constitutional powers in passing the act under which said indictment was found.

2nd. That said act contravenes the act of congress, approved March 2, 1837, providing for the pilotage of vessels into ports, upon waters dividing two States, by pilots licensed by either of such States.

3rd. That said act is in contravention of the laws of the

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United States providing for the relief of vessels at sea in distress, and for salvage to persons saving such vessels, &c.

4th. Because said act is in direct conflict with the jurisdiction of the State of Georgia.

5th. That the grant of powers in said act are extra legislative, and such as the Legislature had no right to confer.

6th. For that the State in the indictment did not negatively allege or prove that the defendant had not authority from the County Commissioners of Nassau county, who, by the act of 1834, were authorized to grant license to pilots to conduct and pilot vessels in all the waters of said county, nor negative the authority from any other competent authority of the State of Florida.

7th. For that the act of 1859 only repealed such laws as came in conflict with the laws of said year, but did not repeal the act of 1834, or vest in the Commissioners of Pilotage for the harbor of Fernandina exclusive authority to grant licenses to pilots to conduct vessels over the St. Marys bar on the waters of Amelia river and within the harbor of Fernandina.

8th. For that the indictment does not allege that said pilotage was performed, the vessel "Five Boys" not being in distress, and that he, the said Samuel Cribb, was not the master of said vessel.

9th. For the reason that the act of 1859, sections 4 and 2, makes a distinction between the bar, harbor and river, and there was no evidence showing where or how far the harbor of Fernandina extended, and no proof that the prisoner conducted said vessel into the harbor of Fernandina.

10th. For the reason that the act of 1859 recognizes the authority of Georgia to grant licenses to pilots to conduct vessels over the bar of St. Marys, and no act of the Legislature of Georgia has been read or given in evidence going to show that said State had ever assented to enter into

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rules of reciprocity between the pilots holding their commissions from the State of Georgia and those holding commissions under the laws of Florida.

11th. For the reason that the act of 1859, prohibiting citizens of Florida from holding a commission from the State of Georgia, is unconstitutional and void, and comes in conflict with the act of Congress of March 2, 1837.

12th. For the reason that where a right of pilotage is vested by the act of 1836, a subsequent act cannot divest said right or require the officer to return his commission for any other cause than that designated where his right of office or pilotage vested.

13th. And for that the verdict was contrary to the weight of evidence.

14th. For that the indictment concludes contrary to the form of the statute, instead of contrary to the statutes.

The verdict of conviction being a general verdict of guilty, the first question is as to the practice of the court in passing judgment, providing all the counts in the indictment are adjudged good, and such as on which judgment may be lawfully awarded, or providing some of the counts are considered bad in form or such as on which judgment cannot be awarded, for the reason there is no such offence in law as charged and for which he has been convicted. We consider the rule to be that if all the counts are good, and such as on which judgment can be awarded, and the evidence warrants the conviction, to pass judgment on the count charging the highest grade of offence; but where the grades of offences are equal in all the counts, as in the case at bar, the practice is to pass sentence on all the good counts of which the evidence is sufficient to sustain the verdict, if it is warranted by the law applicable to the offence charged in that count, on the presumption that was to them that the verdict of the jury attached.

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In carrying out this rule, we turn to the record and take up the third count of the indictment, which charges the offence under the second section of the act of 1859, which is for holding a license, *he being a resident* within the jurisdiction of pilotage for the port of Fernandina in Florida, from the State of Georgia. The offence under the said second section is not for piloting but for *holding a license* from another State, the said defendant being a resident of Florida. The said count is in form good, the offence being charged in the language of the statute, and the evidence seems abundant to support the conviction.

The only question is whether the said section creating the offence is *constitutional*, and whether the judgment entered upon the conviction thereunder can be affirmed.

There can be no question that each State, being sovereign and independent, possessed and must possess the inherent right and power over her citizens and of controlling her inhabitants or residents while they remain as residents. This is a matter of police and internal arrangement for the common welfare of all, the people being the judges for themselves what shall be a grievance as well as a matter of public convenience or inconvenience. Under this power the State has a right to declare what is a public grievance, and prohibit one of her citizens, residing within her jurisdiction, amenable to her laws while he does thus reside, from holding and exercising a license or office from a sister State or any foreign power. The State is the judge of offences against her society, and may punish one of her citizens, resident within her boundaries, for the commission of any act constitutionally enjoined or forbidden by statute.

The offence thus created by statute is a statutory offence. The opinion of the court is that this 2d section of the act of 1859 was not in violation of the constitution of the United States, nor of any law nor treaty made in pursuance or under

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the authority of the constitution. But the difficulty of sustaining the conviction and judgment under this count, is, that although it enjoins or forbids the resident from holding the license, no penalty or remedy by indictment is prescribed. It is not an offence known to the common law. If it were, then our general statute (see Thompson's Digest, 489, sec. 3,) would provide the punishment. The statute that creates the offence has not prescribed the penalty. There is no evidence in support of the second count, but the first and fourth counts seem fully sustained, if weight and due consideration are given to reasonable presumptions forming a body of facts.

It is contended by the plaintiff in error, in the second error assigned, that judgment cannot be awarded, on either of the last mentioned counts, because section 3d of the act of 1859, under which said first and fourth counts are grounded, contravenes the act of Congress approved March 2, 1837, providing for the pilotage of vessels into ports, upon waters dividing two States, by pilots licensed by either of such States, and is therefore unconstitutional. This is an important point, and upon it turns the affirmation or reversal of said judgment. The constitution has conferred on Congress the power "*to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.*" In giving effect to this article of the constitution, it is settled law that the power to regulate commerce includes the regulation of navigation; that the regulation of navigation means the establishment of rules by which it must be carried on. The power extends to the persons who conduct it as well as to the instruments used. Thus in *Cooley vs. Board of Wardens of the port of Philadelphia*, 12 How. Rep., 299, the Supreme Court of the United States say, "If Congress has power to regulate the seamen who assist the pilot in the management of the vessel, a power never denied, we can

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perceive no valid reason why the pilot should be beyond reach of the same power." See also Rice's Law Reports, 252.

We learn from good authority that a system of laws for the regulation of pilots and pilotage existed in the several States at the meeting of the first Congress under the constitution. By the 4th section of the act of Congress of 7th August, 1789, Congress adopted the laws of the several States then existing, and went further. It declared "that all pilots in the bays, inlets, rivers, harbors and ports of the United States, shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be *or with such laws as the State may respectively hereafter enact for the purpose*, until further legislative provisions shall be made by Congress."

The question arose under the act of Congress whether Congress could *prospectively* adopt the laws which the several States may hereafter enact upon the subject of commerce or any of its incidents. It was finally settled that the State possesses a concurrent power over the subject of commerce, and under the 6th article and second clause of the constitution, which reads, "*That this constitution, and the laws of the United States made in pursuance thereof, and treaties made under the authority of the United States, shall be the supreme power of the land*," it was held that when Congress exercises the power, the States cannot. But when Congress "sleeps upon its post," the State may seize its armor and exercise its authority. The laws which the States enact during the somnolency of Congress, the Supreme Court are valid. The cases of *Cooley vs. Board of Wardens, &c.*, 12 Howard, 309, and license cases, 5 Howard, 612, settled the question. And the "supreme power of the land" now declares that the laws of the several States for the regulation of pilots, "are enacted by virtue of a power

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residing in the States to legislate," and are valid until Congress interposes and establishes some other system of regulations.

"Further legislative provision" was made by Congress, upon the subject of pilotage, by the passage of the act of March 2, 1837, which enacts that "it shall and may be lawful for the master or commander of any vessel coming into or going out of any port, situate upon waters which are the boundary between two States, to employ any pilot duly licensed or authorized by the laws of either of the States bounded on the said waters to pilot said vessel to or from said port, any law, usage or custom to the contrary notwithstanding."

There is no doubt that the respective States are the most competent to regulate the pilotage within their own ports, and that it is for the general advantage that it should rest with them. With the exception of the said act of 1837, regulating pilotage in ports situate upon waters which are the boundary between two States, it has been left to them. The question naturally suggests itself, why did Congress, make this exception? The answer is to relieve the commerce of the country from any embarrassment arising from the laws of different States situate upon waters which are the boundary between them. In some such States, their laws compelled masters of vessels to take their pilots on board. Each State, where there is a port situate upon waters which are the boundary between them, without this regulation of Congress, might embarrass commerce by insisting that *their pilot* shall be taken as pilot. It was also to remedy the strife between the two States, so embarrassing to the master, that this act was passed. In fact it was to meet just such a state of things as exists between the States of Georgia and Florida at the ports of Fernandina and St. Marys. By the regulations under this act of Congress, there

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is no impediment to commerce. The master of the vessel can employ a pilot licensed by either State, and the licensed pilot of either State can pilot the vessel in or out of the harbor of either State and over the St. Marys bar. Each State provides for the licensing of their own pilots, which is not interfered with by this Act of Congress. As we have already said, each State may prohibit her citizens, resident within her limits, from holding a license from the other State, but one State cannot control the regulations of the other.—In the opinion of the court, the Act of Congress of 1837, which was passed *before* the act of 1859, was within the scope of the constitutional power of Congress, and was the supreme law of the land when said act of Florida was enacted, and that said 3d section of said act of 1859 contravenes the Act of Congress approved March 2, 1837. This being the case, and there being a conflict between them, the State law must yield. 3 Wheaton, 209, 210; Low vs. Commissioners of Pilotage, R. M. Charlton's Reports, page 314.

There being no count in the indictment upon which judgment could have been lawfully rendered, it follows that the court below erred in arresting the judgment.

It is therefore ordered and adjudged, that the judgment rendered in the court below be reversed, and the plaintiff in error discharged therefrom.

Walker, J.—Whilst fully concurring in the judgment just pronounced, I do not fully concur in so much of the opinion as relates to the third count in the indictment. My mind is not clear that the section on which the third count is based is not calculated to obstruct citizens in the discharge of duties which they might lawfully exercise under a constitutional act of Congress, and is therefore void.

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N. B. BROWARD, APPELLANT, VS. THE STATE.

1. An indictment will lie against a trespasser on the public lands of the state of Florida under the act of January 13th, 1849.
2. Counsel have the right to embody in their motions to quash or in arrest what statements they please, but no court can regard such statements as evidence.
3. The proper way to get facts before an appellate court, in such form as to render them evidence, is to make a statement of them in the shape of a bill of exceptions, and then get the Circuit Judge to sign and seal it and order it to be made a part of the record.
4. An indictment will not be quashed except for something appearing in the indictment itself.

This case was decided at Jacksonville.

Jno. D. Price for appellant.

Attorney-General for the State.

WALKER, J., delivered the opinion of the court.

At the spring term, 1859, of Duval Circuit Court, appellant was presented and indicted, under the act of January 13th, 1849, for trespassing on the public lands of the State of Florida. At October term, 1869, he was found guilty, and judgment was entered against him for twenty dollars. He then appealed to this court.

It is urged that the Circuit Court erred, first, in overruling a motion of counsel for appellant to quash the indictment; second, in overruling his motion in arrest of judgment.

The grounds on which the motion was made to quash the indictment, are

“1st. Because the State of Florida has no title in or to the lands named (which is admitted to be swamp land,) and described in said indictment, or such title as would authorize the State to recover out of these defendants.

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“2nd. That the Legislature have conveyed and transferred all the State’s title to the lands named and described in said indictment, irrevocably, to five trustees, and thereby divested the State of Florida of all legal title to said lands.

“3rd. Said five trustees are the proper parties to bring this action and recover from these defendants any damages which said land sustained by reason of said supposed trespass, being one of the objects of their trust to take care of and protect the public lands, for which these defendants have been indicted.

“4th. The law under which these defendants are indicted is not of a criminal nature, and the action should be on the common law side of the court.”

Admitting that the facts stated in the 1st, 2nd and 3rd of the foregoing grounds are true, they constitute no ground for quashing the indictment. An indictment can be quashed only for something in the indictment itself, as for instance where the facts stated in it do not amount to an offence punishable by law. (See Wharton’s Criminal Law, 184.) But the 1st, 2nd and 3rd grounds above stated do not appear in the indictment. They are facts entirely outside of it, and if true and good for anything, should have been used as evidence on the trial, and not as grounds for a motion to quash. The indictment simply states that the defendant trespassed on certain public lands of the State of Florida, giving the numbers. Now if those lands mentioned in the indictment were swamp land, and had been conveyed to trustees, &c., and those facts constituted any defence, they were clearly facts to go in evidence before the jury, and not to be used on a motion to quash.

The 4th ground assigned on the motion to quash, being also one of the grounds subsequently assigned on the motion in arrest of the judgment, we will consider it in connection with that motion.

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The grounds on which the motion in arrest of judgment was made, are as follows:

“1st. That there is no law upon which an indictment for the above crime or misdemeanor can be found.

“2nd. That there is no law now in force in this State under which an indictment by the grand jury can be legally found for the offence as charged.

“3rd. That said defendants were put on their trial on the criminal side of the court, contrary to law.

“4th. That said indictment concludes against the form of the statute in such cases made and provided, when there is no statute to punish offenders against said law, criminally.

“5th. That the said indictment should conclude against an act of the General Assembly.

“6th. That the patent introduced as evidence contains a patent ambiguity.”

In arguing the first and second grounds above stated, counsel for appellant contended that the act of January 13th, 1849, was virtually repealed by the internal improvement act of January 6th, 1855, inasmuch as that act irrevocably vests in five trustees the lands which it is contended are mentioned in the indictment. But even if it be admitted for the sake of argument, that the act of 1855 repeals the act of 1849, so far as it relates to the lands mentioned in the former act, still it does not follow that the judgment should have been arrested, for the indictment is simply for trespassing on the public lands of the State of Florida, and there is not a particle of testimony in the record to show that the lands on which the trespass was committed are the same lands mentioned in the act of 1855. It is true that the record shows that the counsel for appellant stated in his motion to quash that it was admitted that the lands mentioned in the indictment were swamp lands, but he did not state that fact as a witness but only as counsel, and therefore it could

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not be regarded either by the Circuit Court or this court as evidence. Counsel have the right to embody what statements they please in their motions, and yet, however undisputed their veracity, no court can regard such statements as evidence. The proper way to get facts before an appellate court, in such form as to render them evidence, is to make a statement of them in the shape of a bill of exceptions, and then get the Circuit Judge to sign and seal it, and order it to be made a part of the record.

We desire to call the attention of the bar particularly and pointedly to the rulings of this court on bills of exceptions in the cases of *Proctor vs. Hart*, 5 Fla., 469, and *Bailey vs. Clark*, 6 Fla., 519.

The third and fourth grounds assigned for arrest of judgment are the same in substance as the fourth ground previously assigned on the motion to quash. The idea on which they are all based is, that the act of January 13th, 1849, does not authorize an indictment against trespassers on the public lands, but only a civil action. After a careful examination of said act, however, we are clearly of a different opinion. The first and second sections of said act read as follows:

“SECTION 1. It shall be the duty of the Judges of the Circuit Courts to charge the Grand Juries of their respective counties within their districts, to present all and every person who shall hereafter trespass upon the public lands of this State, to the damage or injury of the same, whether the same are for the support of schools, seminaries or internal improvements.

“SEC. 2. On every such presentment, it shall be the duty of the solicitor to prosecute the person or persons presented in the name of the State, and, upon conviction, the person or persons convicted shall pay the costs and a fine equal to four times the amount of damage sustained by the State on account of said trespass.”

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The terms used in the second section seem to us utterly inconsistent with the idea that a civil suit was intended. The solicitor is to prosecute the *person or persons* presented, and upon *conviction*, the person or persons *convicted*, shall pay a *fine*, &c. It is entirely unusual, in speaking of civil suits, to say a person is *prosecuted*, and *convicted* and *fined*. These are terms descriptive only of criminal proceedings. We are confirmed in this view by the third section of the act under consideration, which reads as follows:

“SEC. 3. It shall be the duty of the solicitors of the several Circuits to bring such actions, for the use and occupation of the above mentioned lands, as he may be directed to bring by the Register of Public Lands, and to prosecute said *suits* to a final recovery.”

In this 3rd section, a civil action is clearly intended, and hence the solicitor is instructed to prosecute, not the *person or persons*, but the *suits* to a final *recovery*, not to a final *conviction*. Persons are prosecuted, *convicted* and *fined* only in criminal proceedings. Suits are *brought* and prosecuted to final *recovery* only in civil proceedings.

The fifth and sixth grounds assigned in arrest of judgment were not relied on by counsel in argument before this court, and we consider that the Circuit Court did not err in overruling them.

Let the judgment be affirmed, with costs.

McLeod vs. Dell.—Statement of Case.

**F. McLEOD, ADMINISTRATOR OF A. DELL, APPELLANTS, VS.
PHILIP DELL, EXECUTOR OF B. M. DELL, APPELLEE.**

1. The opinion of the Chancellor delivered in the court below, forms no part of the record of the case, and cannot be read or referred to in the Supreme Court.
2. The rule which accords to the interpretation of words occurring in a *will*, greater indulgence than when used in a *deed*, must be taken with this qualification, that such indulgence is to be allowed only in aid of the intention of the testator: and where that intention is in *equipoise* between two contrary constructions, the words used, if they have received a well settled technical meaning, must be interpreted in that technical sense otherwise they are to be taken according to their common conception.
3. The words "child" or "children," occurring in a will, usually denote *immediate* offspring, and in that sense are to be taken as words of *purchase*; but employed as *nomen collectivum*, or synonymous with issue or descendants, they are to be taken as words of *limitation*, and are sufficient to create an estate tail. Where this latter construction has prevailed, however, it has generally been aided by the context.
4. The word "child" or "children" may be used as a term of *substitution*, that is, putting the immediate offspring in the place of the parent; or it may be used as a term of *succession*. If employed in the former sense, it will not be taken to import "an indefinite failure of issue."
5. A recognition of the rule respecting "perpetuities," to-wit: "a life or lives in being, and twenty-one years after," is not in conflict with the 24th clause of our "declaration of rights."
6. To authorize the Chancellor to retain a bill, in order that he may give *general* relief, where the *special* relief sought has been denied, it is necessary that he shall have *acquired cognizance* or *gained jurisdiction* of the cause.

This case was decided at Jacksonville.

The following statement of the case was prepared by the Justice who delivered the opinion:

The bill in this cause is filed by the administrators of Amos L. Dell, deceased, against the executor of the last will and testament of Bennett M. Dell, deceased. Amos L. Dell was a son of the said testator, and one of the beneficiaries named in his will.

The bill sets forth that Bennett M. Dell, did on the 21st

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day of February, A. D. 1855, make and publish his last will and testament in writing, which is herein inserted at full length, and is in the following words, viz:

IN THE NAME OF GOD, AMEN. I, BENNETT MAXCEY DELL, of the county of Alachua, and State of Florida, being weak in body but of sound and disposing mind and memory, and calling to mind the frailty and uncertainty of human life, and being desirous of settling my worldly affairs, and directing how the estates with which it has pleased God to bless me—shall be disposed of after my decease, while I have strength and capacity so to do, do make and publish this my Last Will and Testament; hereby revoking and making null and void all other Last Wills and Testaments by me heretofore made. And first, I commend my immortal being to him who gave it, and my body to the earth, to be buried in the Family Burying Ground, in a decent and suitable manner, agreeable to my rank and estate in life. And as to my worldly estate and all the property, real, personal or mixed, of which I shall die seized and possessed, or to which I shall be entitled at the time of my death, I devise, bequeath and dispose thereof in the manner following, to-wit:

1. *Imprimis.* My will is, that all my just debts and funeral charges shall, by my executors, hereinafter nominated, be paid out of my estate, as soon after my decease as shall be by them found convenient.

2. *Item.* To my present much beloved wife, Eliza Dorothy, I give, devise and bequeath the following Negro Slaves, that is to say, Jack, Juliana, and her four children, Lewis Henry, Francis, Billy and Grace; Somerset Betsy and her two children, Jim and Sappho; Adam and Peggy, and her child Mitchell, with their increase, to have, to hold and enjoy during her natural life, should she not marry after my decease; but if she does marry after my decease, it is my will

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that the above-mentioned negro slaves shall, immediately upon such marriage, revert to and be equally divided among my children or their children, subject to certain restrictions and conditions hereinafter set forth and mentioned. And it is further my will that my wife, the said Eliza Dorothy, from the time of the marriage referred to above, shall receive annually the sum of five hundred dollars, to be paid to her by my executors, hereinafter nominated, out of such portion of my estate as shall seem most proper to them, during her natural life; but if my wife, the said Eliza Dorothy, does not marry after my decease, then it is my will that she shall possess, hold and enjoy the aforementioned and above described negro slaves, with their increase, during her natural life, and upon her death, the said negro slaves, with their increase, shall be equally divided among my present children, surviving her death, or their children, share and share alike, subject to the restrictions above referred to, and hereinafter mentioned and set forth.

3. *Item.* It is also my will that my said wife, Eliza Dorothy, shall be permitted to choose for her residence my plantation now occupied by me near Newnansville, and known as "Standby," or any other place which I may at the time of my death be possessed of or entitled to, and shall be allowed five horses and a carriage, and all necessary farming utensils and implements for the place which she may select; she shall also be allowed one hundred head of cattle, also all the hogs belonging to my place near Newnansville, known as "Standby," and also all the household and kitchen furniture which may be upon my place known as "Standby," at the time of my death; the said place which she may so select, and the said carriage and horses, and the said farming utensils, and the said cattle, and the said hogs, and the said household and kitchen furniture, to be held and enjoyed by her during her natural

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life, subject on her marriage or her death to be disposed of as in the above first item specified, and subject to the same restrictions and provisions as above referred to and hereinafter set forth and mentioned.

4. *Item.* I hereby give, devise and bequeath to my much beloved daughter, Sarah Angelina, the following-named negro slaves, that is to say—Charlotte and her two children, Charles and Washington; Jacob and Polly, with their increase, to have, to hold and enjoy during her natural life, and at her death, to be equally divided among my present children or their children surviving her death, subject to the same conditions and restrictions as referred to above, and hereinafter set forth and specified. And I hereby nominate, constitute and appoint my executors, hereinafter nominated, trustees for my beloved daughter, Sarah Angelina, and earnestly recommend her to their special care and protection.

5. *Item.* I also give, devise and bequeath unto the children of my son Charles L., who lately died in Texas, so much of my estate as their father would have received under this will, had he survived me, to be paid in money, when they, the said children of my son, the said Charles L., shall respectively arrive at the age of twenty-one years. And I hereby nominate, constitute and appoint my executors, hereinafter nominated, trustees for the said minor children of my son, Charles L., deceased, with full power to convert such portion of my estate as they may be entitled to, into money, and invest the same as may be most advantageous to the said children aforesaid; but if they, the said children of my son, the said Charles L., deceased, die before arriving at the age of twenty-one years, then the property to which they may be severally entitled under this will shall revert to and be equally divided among my present children or their children surviving the death of the children of my son,

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the aforesaid Charles L., deceased, share and share alike, subject to the same restrictions and provisions referred to above in this will, and hereinafter set forth and mentioned.

6. *Item.* It is my will, that my tract of land, lying on or near Paine's Prairie, and known as the "Garey Tract," be not sold until it is worth twenty-five dollars per acre.

7. *Item.* It is further my will, that such portion of my estate as shall come to my present wife, Eliza Dorothy, under this will, or to her children, shall be kept together during the life or until the marriage of my present wife, the said Eliza Dorothy, under the direction of my executors hereinafter nominated; but upon the arrival at twenty-one years of age of any of my children, they may, if they see fit, separate their portion of my estate which may come to them under this will, from that of my present wife, Eliza Dorothy, and my other minor children.

8. *Item.* The balance of my land not disposed of by this will, and all of my stock of cattle, hogs and horses not disposed of by this will, and all the cattle, hogs, horses and other stock of which I may die possessed, I direct my executors, hereinafter nominated, to sell upon the most advantageous terms, and divide the proceeds thereof equally among my children surviving my death, or their children, giving to each his or her share at the age of twenty-one years respectively; and I hereby nominate, constitute and appoint my executors, hereinafter nominated, Trustees for my children or their children who may be under the age of twenty-one years at the time of my death, until they shall respectively arrive at the age of twenty-one years, with full power and instruction to place the said proceeds at interest, and use the same in the education of my said children or their children, in proportion to their respective shares.

9. *Item.* I will further that all of my slaves, not hereinbefore disposed of, or of which I may die possessed, shall be,

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at my death, equally divided among my surviving children, or their children, in manner and form as hereinbefore specified, subject to conditions and restrictions hereinbefore referred to, and hereinafter set forth and mentioned.

10. *Item.* It is also my will that such portion of my estate as shall, under this will, come to my daughter Mary S. wife of Christian F. Duer, now residing in Texas, or to her children, or their children, shall be held by my executors, hereinafter nominated, in trust for my said daughter or her children, during the lifetime of the said Christian F. Duer; and I direct my executors as trustees, to invest such of her portion as shall be in money, and pay over the interest annually, as well as the proceeds of such as shall be slaves, to my said daughter, or for the benefit of her children; and at the death of said Christian F. Duer, to pay over the whole portion to my said daughter, or her children, subject to the conditions referred to above and hereinafter set forth and fully explained.

11. *Item.* I also bequeath to my executors, hereinafter nominated, in trust for the Methodist Episcopal Church, in the place where my wife shall choose to reside, provided my wife shall choose to reside at "Standby," or some other place in East Florida, the sum of one thousand dollars, to be paid out of such portion of my estate as may seem most proper to my executors, hereinafter nominated, and to be put out at interest by them, and the interest paid annually for the benefit of said Church, but under no circumstances to be paid to any man raised North of Mason and Dixon's Line, or tainted with Abolitionism in the least degree; and if the said Church where my wife may choose to reside should employ any man as above described, then the interest of the said sum of one thousand dollars shall be applied to a common school in the county where my wife may choose to re-

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side, during the time any man as above described is employed.

12. *Item.* I hereby declare my will in regard to all my property, whether personal, real or mixed, disposed of by this will, so far as my children or their children are concerned. Where my property is given, devised and bequeathed or in any manner disposed of by this will, to any of my children, or their children, it is my express will that it shall be enjoyed by them during their lifetime, and upon their deaths it shall go to and be vested in their children, if any; and upon failure of children of any of my children, or their children, then the property to which my said children or their children might have been entitled, under this will, shall be divided among my surviving children or their children. And in no case where my property is devised, willed or bequeathed, or in any manner disposed of to any of my children, shall they sell or convey the same, nor shall it be subject to their debts; but the property shall be held for life, and upon the death of any of my children or grand-children, where my property is *directly* willed to them, the same shall go to and vest in their children, and upon the failure of *such* children, then the property thus held by them upon their deaths shall be equally divided among my surviving children or their children.

13. *Item.* It is further my will that the property which may come to my son Amos L., under this will, shall be under the control and management of my executors, hereinafter nominated; and shall not, under any circumstances, be subject to his debts, but he shall only enjoy it during his natural life, and upon his death it shall go to his children, subject to the restrictions as in the above last item specified.

14. *Item.* Finally, I hereby nominate,, constitute and appoint my sons Philip and John, executors, and my wife, Eliza Dorothy, executrix of this my Last Will and Testa-

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ment, with full power and instruction to execute the same and the trusts therein named; but it is my will that my wife, Eliza Dorothy, shall only act as executrix until my son John arrive the age of twenty-one years.

The bill further shows that soon after the execution of this will, the testator departed this life. The particular date of his decease is not stated, but it is alleged to have occurred in the year 1855. That upon the death of the testator, the defendant and Eliza Dorothy Dell, who, by said will, were appointed executor and executrix, made probate of the same, and assumed the duties and obligations thereby devolved upon them. John, a son of the testator, was also appointed an executor, but was then under age, and that Eliza Dorothy is dead, and the defendant, Philip, is sole acting executor.

The bill also shows that Amos L. Dell was one of the distributees of the estate of Bennett M. Dell, and that he died sometime in the year 1856, *intestate*, and that on the 20th of July, A. D. 1847, the complainant was appointed administrator of his estate. It further shows that Amos L., the *intestate*, left surviving him, his wife, Mary E. Dell, and one infant child. Whether this child was born in the life-time of Bennett M. Dell, the testator, or subsequent to his decease, does not appear. That Amos L., the *intestate*, was living at the date of his father's death, and had attained to the age of twenty-one years, and was then entitled to his distributive share of the estate. That the number of heirs and distributees were, at the date of the filing of the bill, nine. That the personal property was appraised at \$63,067.49. That the defendant, sometime in the year 1856, pretended to make a distribution of the estate amongst the heirs and distributees, but denies defendant's authority, and the legality of such distribution and settlement, so far as the estate of

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Amos L. Dell is concerned. As the ground of said illegality in relation to Amos D. Dell's estate, the bill alleges that the said distribution and settlement was made without any *notice* having been given to the intestate, and without competent legal authority, and without commissioners appointed by the proper court for the purpose of distributing said estate. It further alleges as ground of objection to said settlement, that the distributable share of Amos L. was charged with the value of five certain named negroes, and avers that the said negroes were the sole and individual property of the estate, and not a part of the estate of his father, the testator, and should not therefore have been charged against his distributive share.

The bill further states that the defendant has, since the death of Amos L., seized and taken into his possession the said five negroes, and also all the negroes and other property which had been turned over to Amos in his life time, as his share of his father's estate, under a claim as *Trustee* for the infant child of Amos. The bill denies the validity of defendant's claim as Trustee, and prays a decree against the defendant for an account, and that the ninth part, (Amos's share,) of the clear residue of the estate of Bennett M. Dell, deceased, be paid over to the complainant as administrator of Amos L. Dell, and for further relief, &c. There is no specific prayer for the five negroes alleged to be the individual property of the intestate. The foregoing is the substance of complainant's bill.

To this bill the defendant filed his answer, in which he embodied a demurrer in the following words, to-wit: "That he shall insist and does hereby insist, that the said complainant, where in said bill he claims right of discovery and account against this defendant as executor as aforesaid, under and by virtue of the legacy to Amos L. Dell, deceased, in said will of Bennett M. Dell, deceased, contained has not,

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made or stated in so much of said bill, such a case as doth or ought to entitle him as administrator of the assets which were of Amos L. Dell, deceased, to any such discovery or relief as is thereby sought and prayed for, from or against this defendant, and he insists upon and sets forth the cause, and prays that he may have the same benefit thereof as if he had demurred to so much and such parts of said bill, to-wit: That inasmuch as it is shown and averred in said bill of complaint, that said Bennett M. Dell, deceased, in and by said last will and testament bequeathed and devised the said property to be under the control and management of the said defendant as Trustee, and not under any circumstances to be subject to the debts of said Amos L. Dell, and the said Amos L. Dell was only to enjoy it during his natural life, and upon the death of Amos L. Dell, to his child, that the legal title in said property vested in the said defendant in trust, that the said defendant now holds the same in trust for the said William O. Dell, infant child of said Amos L. Dell, deceased, and that the same were not assets, which were of the said Amos L. Dell, deceased, at the time of his death, and such assets as should be administered upon by the said complainant as such administrator."

The answer goes on and alleges that *all* of the property claimed by the complainant as administrator on the estate of Amos L. Dell, was embraced in and formed the legacy bequeathed and derived under the will of his father, Bennett M. Dell, and came to the possession of and was held by the defendant under and by virtue of the *trust* declared in the said will. It denies the allegation of the bill of a want of *notice* to Amos L. Dell, concerning the distribution and settlement of his father's estate, and affirmatively alleges full notice to and affirmation by the said Amos, of the said distribution and settlement. With respect to the five negroes, the answer denies the title of Amos, and alleges that they

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only constituted a loan to him from his father, and to be brought into the distribution of his estate whenever made, and asserts the defendant's right to the possession of them, as trustee, under the terms of the will of Bennett M. Dell. This is the substance of the answer. To this answer, the complainant filed numerous *exceptions*, and the cause was submitted to the consideration of the Chancellor, upon these exceptions, and the demurrer embodied in the answer.

On the 11th day of August, A. D. 1859, the following decree was ordered to be entered in the Chancery Order Book for the county of Alachua, in the Eastern Circuit of Florida, to-wit:

"This cause came on to be heard on demurrer, and was argued by counsel for the respective parties, and submitted for decision thereon; and the court having fully considered the same, orders, adjudges and decrees that the demurrer to complainant's bill is well taken, and the same is sustained.

From this decree, the complainant took an appeal and now brings his cause to this court for review and final adjudication. The "petition of appeal" filed in this court, is in the following words, viz:

"In this cause, Ferdinand McLeod, by his solicitors, M. Whit Smith and W. M. Ives, files the following exceptions to the ruling orders and decrees in said cause:

"1st. For that the presiding Judge held that the complainant's intestate had but a life estate under the will of Bennett M. Dell, whereas, he contends and avers that by virtue of said will, and by force and operation of law, his intestate was entitled to an absolute estate.

"2nd. For that the Judge, in reference to the five slaves, alleged and admitted in the pleadings to have been in the possession of Amos L. Dell prior to, and at the time of making the said will, by B. M. Dell, which are insisted in

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the answer to be held by the defendant as trustee, the said judge declined to make a decree in reference to said slaves, but refers the complainant to his remedy at law; whereas, the complainant alleges and avers that trust estates are exclusively within the jurisdiction of chancery, and that the Judge should have determined and decided the question whether the slaves were properly taken and held by the defendant or not; more especially as the defendant by his answer admits that the said slaves were in possession of Amos L. Dell prior to the making or publishing of said will by Bennett M. Dell, and that the said B. M. Dell was not possessed of said negroes at the time of his death, and the said testator did not mention or allude to said five slaves, in his said will.

“3d. That the court having taken jurisdiction of the bill, should have decided and determined all the questions therein, and should have decreed the said five slaves to be delivered to the defendant, as assets of the estate of Amos L. Dell.

“4th. That the court erred in not sustaining the exceptions filed to the answer of the defendant, and in not requiring a more full and perfect answer.

“5th. That the court erred in sustaining the demurrer and dismissing the bill.”

Banks & McLeod and Smith & Ives for appellant.

J. P. Sanderson for appellee.

DUPONT, C. J., delivered the opinion of the court.

Preliminary to the consideration of the questions growing out of the law of this case, and upon which the rights of the parties are to be determined, it may not be out of place to call attention to a point of practice, which seems to have

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escaped the observation of the counsel who prepared the “petition of appeal” filed in this court. The petition sets forth, by way of exceptions, the grounds assumed by the chancellor in his opinion delivered in the court below, and which it is presumed formed the basis of his decree sustaining the demurrer and ordering the bill to be dismissed. In the case of *Smith & Armisted vs. Croom et al.*, (7 Fla. R., 180,) this court ruled that the opinion of the chancellor forms no part of the record of the case, and cannot be read or referred to in this court. The language of the court in that case is as follows: “We will not feign an ignorance of the source whence the counsel who framed the petition for this application” (*a re-hearing*) “derived the information that the question of the survivorship of the son had passed *sub-silentio* before the chancellor. That information we presume was furnished by the printed opinion of the chancellor, which was politely handed to the members of the court during the progress of the cause, and the perusal of which they did not debar themselves from any false notion of propriety. But it will be distinctly recollected, that the court refused to permit the same to be read, for the avowed reason that it constituted no part of the record upon which they were called to decide. This court will always gladly avail itself of the light which may be furnished by the reasoning of the court below; but when it comes to decide, it has to do only with the conclusions as they are embodied in the judgment or decree—the logic of the judge is beyond its control.”

Under the rules of practice, as now controlled by the statute, we are constrained to approve the ruling in the case above referred to, but at the same time think that it would be a great improvement if the Legislature would require that every decree in chancery should be accompanied by the written opinion of the chancellor, setting forth the grounds

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of the decree, and also that when an appeal is taken, such written opinion shall be embraced in and constitute a part of the record of the case.

In proceeding to this investigation, it must be kept in mind that the questions of law to be discussed arise exclusively upon such state of case as is presented by the face of the complainant's bill. The decree appealed from being upon demurrer, the denials or affirmative allegations of the answer, do not affect the result of the investigation. It is proper also to note that the will of Bennett M. Dell, deceased, having been incorporated into the bill and made a part of the same, exercises a controlling influence in making out the case presented by the complainant.

The hypothesis upon which the claim of the complainant is based, finds its sanction in the doctrine of the law against the encouragement of perpetuities. That doctrine was correctly laid down and ably sustained by the counsel for the complainant, and the only point upon which there can arise a question is as to its application to the case as made in the bill.

The counsel for complainant were understood as insisting that by the "peculiar phraseology" of the devises and bequests made to the complainant's intestate, in the will of defendant's testator, Bennett M. Dell, if applied to real estate, they would have created an "estate tail;" and that position being assumed, the well-recognized doctrine was invoked, to the effect that whenever the words used to make a bequest of personality, would, if applied to realty, create an estate tail, then the first taken will take the absolute interest in the subject matter of the bequest. Upon these two principles of law, the counsel for complainant insist that Amos L. Dell took under his father's will, an absolute estate and interest in all the property devised and bequeathed to him, unrestricted by any of the limitations

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therein contained, and that the same are assets of his estate, to which his administrator is entitled. If the *premis* be correct, then it is beyond question that the *conclusion* arrived at must legitimately follow. We have then to examine whether or not the words used in this will would, if applied to realty, create in the devisee an estate tail?

An “estate tail” may be defined to be, substantially, “a fee conditional at common law, limited to certain heirs, to the exclusion of heirs general—to lineals to the exclusion of collaterals.”

It was admitted in the argument that “heirs of the body” are the aptest words to create an estate tail; that they are words of inheritance and pro-creation too, and are as necessary *in a deed* as the word “heir.” But then it was contended that they are not needed (quoting the words of Blackstone) “in *last wills and testaments*, wherein greater indulgence is allowed.” 2 Black. Com., 115, margin. Much stress was laid upon this indulgence according to the interpretation of the language of wills, in contradistinction to the rule to be observed with reference to that of a deed. But a little reflection, accompanied by careful examination of the authorities, will suffice to show that such indulgence is allowed only in aid of the intention of the testator; and where that intention is in *equipose* between two contrary constructions, the words used, if they have received a well settled technical meaning, must be interpreted in that technical sense, otherwise they are to be taken according to their common acceptation. Least of all shall such indulgence ever be allowed to defeat the intention of the testator. With these preliminary observations we now proceed to ascertain the precise words used in this will, and the interpretation of which has given rise to this controversy. And here we may congratulate ourselves that the skillful draughtsman of this will has relieved us

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from the irksome task of threading the devious windings of that mazy labyrinth, which has bewildered so many of the brightest luminaries of the law. Throughout this entire will, embracing fourteen distinct items or clauses, as may be seen by reference to the copy incorporated in the statement of the case, those mystical and enigmatical words which have evolved so much of legal lore, and not a little of legal sophistry, "*heir*," "*issue*," do not appear. Indeed it would seem that the careful draughtsman, admonished by the experience of the past, had purposely excluded them, lest their presence, even with the commonly recognized limitations and restrictions, might give rise to some question as to the INTENTION of the testator. How illy he has accomplished his benevolent purpose, is abundantly attested by the present controversy.

The words occurring in this will, and which we are called upon to interpret, are, "my children" and "their children." It was insisted by the counsel for the complainant that the word "children" was sufficient to create an *estate tail*, and we were cited to the case of Wood vs. Barrow, reported in 1 East., 259. By reference to that case, it will be seen that the word "children" did not stand by itself, but that it was coupled disjunctively with the more technical word "*issue*." The devise there was to "my daughter Ann, &c., who shall hold and enjoy the same as a place of inheritance to her and her children, *or her issue, forever*. And if it should so happen that my daughter Ann should die, leaving no child, or children, or if it so happen that my daughter Ann's children should die without issue," then over. At the argument of that case, Manley, for the defendant, insisted "that the case fell expressly within the rule laid down in *Wild's case*, that if a man devise land to A. and to his children and issue, and he have then issue, the issue shall take a joint estate for life with A." Lord Kenyon observed

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that “there were other words here, namely: that Ann Wood should enjoy the estate *as an inheritance*, to her and her children or issue *forever*.” The italicised words so occur in the report of the case, and would thus seem to have exercised a controlling influence in bringing about the decision that was ultimately made, giving to Ann an *estate tail*. The words of the will before us are not controlled or affected by any such influence.

The case of Doe dem. Gigg vs. Bradley, 16 East, 399, was cited to the same point. The devise in that case was, “to my daughter Sarah Knight’s children, to be equally divided between them, share and share alike, and to the survivor of them and their children.” It was held in that case that the children of S. K. took an absolute interest in the premises, share and share alike, subject to a survivorship between them for life. By reference to the opinion delivered in that case, it will be observed that the conclusion of the court was based upon no special stress to be given to the words “their children,” but rather upon the evident *intention* of the testator to make “a certain equal and rational disposition of his property, instead of one which is uncertain, unequal and to depend upon accident.”

The references to 2 Jarman on Wills, 72, 318 and 326, have been examined, and the result of that examination is but to confirm us in the position heretofore laid down, viz: that wherever the word “child” or “children” has received an interpretation extending it beyond its more precise and obvious meaning, as denoting *immediate* offspring, and been considered to have employed as *nomen collectivum*; or synonymous with *issue* or *descendants*, that interpretation has been given in aid of and in deference to the manifest intention of the testator, to be gathered from the whole will. In confirmation of the correctness of this position, we cite 2 Jarm. on Wills, 73, where it is said, in reference to

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this very point, "where this construction has prevailed, however, it has generally been aided by the context."

To meet and obviate the effect of this position, it was very forcibly insisted by complainant's counsel, that whatever may be the interpretation to be given to the word "child" or "children," when standing by itself, yet it may be used as a term of *succession*, and thereby import an *indefinite failure of issue*; and that it is in that sense the testator intended to use it in this will. It is undoubtedly true, that the words may be used in the sense indicated in the argument, and that when so used, if the intended succession exceeds the limits of the prescribed rule, the result will unquestionably follow as contended for by counsel. But the question reverts, did the testator *intend* to use these words to indicate an indefinite succession, or did he intend to use them *substitutionally*, that is, putting the children of any of his immediate offspring that had or should die in the place of their parents? To determine that question resort must be had to the peculiar phraseology of the items of the will which are involved in this investigation. It is perhaps unnecessary to set out *in haec verba* any other than the item numbered 12, as it is in that item that the limitations and restrictions occur. The entire will is incorporated in the statement of the case, and can be referred to if desired. The twelfth item is in the following words, viz:

"*Item.* I hereby declare my will in regard to all my property, whether personal, real or mixed, disposed of by this will, so far as my children, or their children are concerned. Where my property is given, devised and bequeathed, or in any manner disposed of by this will, to any of my children or their children, it is my express will that it shall be enjoyed by them, during their life time, and upon their deaths it shall go to and be vested in their children, if any; and upon failure of children of any of my child-

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ren, or their children, then the property to which my said children, or their children, might have been entitled under this will, shall be divided among my surviving children or their children. And in no case where my property is devised, willed or bequeathed, or in any manner disposed of to any of my children, shall they sell or convey the same, nor shall it be subject to their debts; but the property shall be held for life, and upon the death of any of my children, or grand children, where my property is directly willed to them, the same shall go to and vest in their children; and upon the failure of such children, then the property thus held by them, upon their deaths shall be equally divided among my surviving children or their children."

It will be noted that there are three distinct clauses in this item of the will. The first merely indicates the subject-matter as referring to the property and the beneficiaries thereof, viz: "my children or their children." The second declares the *contingency*, viz: "upon failure of children of any of my children or their children," and also the *limitation*, viz: to "my surviving children or their children." But as if to make assurance doubly sure, the third clause reiterates the contingency and limitation contained in the second, and gives an interpretation to the words "or their children," by substituting the words "or grand children," and appending the very significant qualification indicated by the words "where my property is *directly* willed to them."

And there was ample ground for this extreme particularity of phraseology to be found in the condition of the testator's family at the date of the will, for by reference to the fifth item, it will be seen that the bequest was made *immediately* to the "children" of a deceased son, and not *mediately* through their father. Upon mature consideration of this clause of the will, and with an anxious desire to arrive

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at the intention of the testator, we are fully satisfied that the words "or their children," were designed to be used as words of *substitution* and not of *succession*. But it is objected to this view of the case that such interpretation is in conflict with the rule of construction commonly referred to as the doctrine of *Wild's case*, which is, that "where lands are devised to a person *and* his children, and he has no child at the time of the devise, the parent takes an *estate tail*." To show the inapplicability of that case, it is only necessary to advert to the *reason* of the rule, as it is given in the books, viz: "that the intent of the devisor is manifest and certain that the children (or issues) should take; and as immediate devisees they cannot take, because they are not *in rerum natura*, and by way of remainder they cannot take, for that was not his (the devisor's) intent, for the gift is immediate, therefore such words shall be taken as words of limitation."

Now, in the will under consideration, the gift is not *immediate* to the children, but mediately through the respective parents; and there is a clear and manifest *intent* that they should take by way of *remainder*. These two particulars are sufficient to distinguish between the two cases and to reconcile any apparent conflict. If we are correct in the foregoing conclusion, it will only remain to inquire whether the limitation over is within the limits of the rule which has been established against the occurrence of "perpetuities." That rule, as well established, is, that the limitation shall not extend beyond "a life or lives in being, and twenty-one years after." In the will before us, the immediate legatee takes (by express words), only a *life estate*, with remainder over to his child or children; and upon failure of such child or children, then over to the surviving children of the testator, or of such of his children as had taken as immediate legatees. It will thus be seen that the

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term of limitation is only for *one life*, and that it does not even trench upon the “twenty-one years after” allowed by the rule, for by the express words of the will, the remainders *vest* immediately upon the termination of the life of the first taker. We conclude then that the limitation in this will is not void for remoteness, but that it is good to pass the property given to Amos L. Dell to the child or children surviving him by way of vested remainder.

It is objected, however, that by our recognition of the *rule* respecting perpetuities, we come in conflict with the 24th item of our “declaration of rights,” which declares “that perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed.” We are at a loss to comprehend the force of the objection, and do not appreciate its logic. It is a sufficient reply that the convention which ordained that declaration, are to be presumed to have understood the full import of the term used.

It was further objected that “a proviso to an absolute bequest, such as that the first taker shall not alien, or that the estate shall not be subject to his debts, is void.” There is no doubt of the law, as thus stated, but its applicability to the bequest in this will is denied. Here there was no absolute estate given, but only an estate limited to the life of the first taker, and that, too, protected by a *trust* in a third party.

It was further insisted, that as by terms of the will, the intestate, Amos L., was to be paid at the age of twenty-one, and as he had attained to that age before the death of the testator, the *legal* estate vested in him. This argument, we presume, is predicated upon the phraseology of the eighth item of the will, wherein the testator undertakes to dispose of the balance of his estate not otherwise disposed of, and which directs the Executor to “give to each, his or her share at the age of twenty-one years respectively.” Un-

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doubtedly, if this was the only item of the will affecting the interest of Amos L., he would have taken the *legal* estate; but the 13th item is express and beyond cavil as to the interest which he was to have in the property bequeathed to him under the will. That item is in the following words, viz:

“*Item.* It is further my will, that the property which may come to my son Amos L., under this will shall be under the control and management of my executors, hereinafter nominated; and shall not, under any circumstances, be subject to his debts, but he shall only enjoy it during his natural life, and upon his death, it shall go to his children, subject to the restrictions as in the above last item specified.”

If this be not such a clear declaration of a *trust* as will vest the *legal* title in the executors, and limit the interest to be enjoyed by Amos to the mere *usufruct*, then we are at a loss to conceive a collocation of words which would accomplish that purpose.

We have thus travelled over the entire argument of the counsel in support of the right of the complainant, as administrator of the estate of Amos L. Dell, to have the possession of the property which came to his intestate in his life time, under the will of his father, Bennett M. Dell, and to administer the same as assets of his estate, and after mature consideration, we are constrained to decide that Amos L. took only a *life estate* in the *usufruct* of the property, and that the same constitutes no part of the estate to be administered by the complainant as his administrator. In arriving at this conclusion, the court has had necessarily to confine the investigation to the case as made out by the *bill*, uninfluenced by any of the admissions, denials or allegations of the answer. Of course, the will being made an *exhibit* by the complainant, formed a prominent feature in the statement of his case.

This brings us to the consideration of the second prom-

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inent objection to the decree of the chancellor, viz: that the bill ought to have been retained for the purpose of having the title to the five negroes promptly adjudicated. The position assumed under the head of the argument was, that “the court having taken jurisdiction of the case, should dispose of it as a whole, and not refer back the question as a legal one.”

The general rule upon this subject, as announced by Mr. Fonblanque, is as follows: “The court having *acquired cognizance* of the suit for the purpose of discovery, will entertain it for the purpose of relief in most cases of fraud, account, accident and mistake.” Fonb. Eq., B. 1, ch. 1, § 3, note *f*. The rule as laid down by the courts of New York is, that “when the Court of Chancery has *gained jurisdiction* of a cause for one purpose, it may retain it generally for relief.” *Armstrong vs. Gilchrist*, 2 John. cases, 424; *Rathbone vs. Warren*, 10 John R., 587; *King vs. Baldwin*, 17 John R., 384. According to the terms of the rule as laid down by Fonblanque, it is essential to the granting of the relief, that the court should first have “acquired cognizance of the suit, and as laid down in New York, that the court should have “gained jurisdiction of the cause.”

Mr. Story, in commenting upon this rule, says: “From what has already been stated, it is manifest, that the jurisdiction in cases of this sort, attaches in equity, solely on the ground of discovery. If, therefore, the discovery is not obtained, or it is used as a mere pretense to give jurisdiction, it would be a gross abuse to entertain the suit in equity, when the whole foundation on which it rests is either disproved, or it is shown to be a colorable disguise, for the purpose of changing the forum of litigation. Hence, to maintain the jurisdiction for relief, as consequent on discovery, it is necessary, in the first place, to allege in the bill that the facts are material to the plaintiff’s case, and that the

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discovery of them by the defendant is indispensable as proof; for if the facts lie within the knowledge of witnesses, who may be called in a court of law, that furnishes a sufficient reason for a Court of equity to refuse its aid. The bill must therefore allege (and if required the fact must be established,) that the plaintiff is unable to prove such facts by other testimony. In the next place, if the answer wholly denies the matter of fact, of which discovery is sought by the bill, the latter must be dismissed; for the jurisdiction substantially fails by such a denial." 1 Story Eq. Ju., § 74. Applying the rule as above stated, with the comments of the learned author just quoted, to the point under consideration, and there can be no question but that the Chancellor below did right in refusing to retain the bill for the purpose of having the title to the five slaves adjudicated in that forum. The bill on its face expressly alleges the *legal* title to these slaves to have been in the complainant's intestate, and as expressly negatives a *trust* in the defendant. Neither does it allege any ground which would entitle the complainant to ask for a discovery touching the title to the same. In fact, the Chancellor by sustaining the demurrer, (which it must be noted was to the whole bill,) expressly decided, that he had neither "acquired cognizance," nor "gained jurisdiction" of the cause.

Here we might close this opinion, but for a very important question which has suggested itself to the mind of the court during the progress of this investigation. That question touches the right of the defendant to retain in his possession, and under his control, the property, the *usufruct* of which was given to Amos L. for life. After mature consideration, we are of opinion, that the *trust* created by the will of Bennett M. Dell, in favor of the defendant, expired and became fully *executed* upon the death of Amos L., and that the interest of the infant child, the designated remain-

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derman, requires that all of the property to which he may be entitled as such remainderman, should be turned over to a proper guardian, to be appointed by the competent authority.

It is ordered, adjudged and decreed, that the decree of the Chancellor sustaining the demurrer to the bill, be *affirmed* with costs.

F. McLEOD, ADMINISTRATOR, OF A. L. DELL, APPELLANT, VS.
P. DELL, EXECUTOR OF W. DELL, DECEASED, APPELLEE.

1. Neither land nor slaves will pass in this State by *nuncupative* will.
2. The 51st section of the act of 1828, on the subject of last wills and testaments, is to be taken to be restrictive in its operation, and intended to confine the testamentary disposition of both land and slaves, to wills in writing.
3. Where a testator, by *nuncupative* will, gives to his executor all of his estate both real and personal, *in trust*, for the payment of debts, and the balance to be distributed to certain named legatees, if the devise and bequest of the land and slaves should fail, he will hold such of the chattel interests as do pass by the will subject to the payment of the debts of the estate, and not as a specific legacy.

This case was decided at Jacksonville.

The facts of the case are sufficiently set forth in the opinion of the court.

Banks & McLeod and *Smith & Ives* for appellant.

J. P. Sanderson for appellee.

DUPONT, C. J., delivered the opinion of the court.

The bill in this case was filed in the Circuit Court of Alachua county, by Ferdinand McLeod, as administrator on the

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estate of Amos L. Dell, deceased, against Philip Dell, as executor of the last will and testament of William Dell, deceased.

The bill sets forth, in substance, that the testator, William Dell, departed this life some time in the year 1854, having previously, to-wit, on the 21st day of October in that year, duly made and published his last will and testament, in the following words, to wit:

“I give and devise all my real and personal estate of whatever nature, to my brother Philip Dell, the executor of my last will and testament hereinafter nominated and appointed, *in trust*, for the payment of my lawful debts; and after that to convey one third part of the residue of my real and personal estate to my brother Amos Dell, to have and to hold during his natural life, and to the heirs of his body forever. One third part to my sister Mary S. Dewer, to have and to hold during her natural life, and to the heirs of her body forever. And my brother Philip Dell, the executor of my last will and testament, to retain one third part for himself and the heirs of his body. I nominate and appoint my brother Philip Dell, to be the executor of my last will and testament.

The bill further sets forth that the defendant proved the said will, and entering upon the execution of the same, possessed himself of all the testator's real and personal estate. That the inventory and appraisement filed in office by the said executor, was not made in accordance with law, and does not exhibit the true value of the estate. That sometime in the year 1856, the defendant pretended to make a distribution and settlement of the estate, but alleges that the same was made without notice to the intestate, Amos L., and without competent authority.

The bill further shows that Amos L. departed this life intestate, some time in the year 1856, leaving him surviving,

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his wife Mary E. and infant child, both of whom were living at the date of the filing of the bill, and administration on his estate has been duly committed to the complainant, and prays for an account.

The answer admits the making of the will by William Dell, but alleges it to have been a “nuncupative” will; admits his office of executor; admits omissions in the inventory filed, and alleges that they occurred through inadvertance and accident. Denies that the inventory and appraisal was not duly filed in accordance with law.

The answer further alleges that by a mutual understanding and arrangement between himself, the said intestate, Amos L. and Mary E. Dewer, the three legatees named in the will of William Dell, deceased, he did deliver to each of the said legatees, certain named negroes at certain valuations, on account of their respective interests, but *submits* whether or not he had authority to administer the said slaves by virtue of the said *nuncupative* will, and asks for the direction of the court.

The answer further alleges, that by the consent and with the approbation of the said Amos L. and Mary E., he, as executor, did sell the *real* estate of the said William Dell, and apply the proceeds of the same as far as they would go, to the payment of the debts of the said estate, but insists that, if it shall be determined by the court that the real estate did not pass under the will of the testator, he shall be permitted to retain so much of the assets of the estate as did pass, to indemnify him for the debts that he has already paid and may yet have to pay.

The answer further insists that whatever interest of Amos L. passed under the will, came to the executor as a *legal* estate, and that he ought to be permitted to hold it for the benefit of the infant child, to the exclusion of the mother and widow.

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The cause was submitted to the Chancellor upon bill, answer and exhibits; and on the 13th day of January, A. D. 1860, the following decree was pronounced, viz:

“1st. That this being a nuncupative will, the slaves and real estate did not pass under it, and that as to them the testator died intestate.

“2d. That it be referred to John S. Kirkland, Master in Chancery, to take and state the account between the defendant and the estate of William Dell, deceased, which account shall exhibit the amount and description of assets, (excepting land and slaves) which were of the estate of William at the time of his death, and which have at any time since come to the hands of defendant as executor for distribution; and the sums which he has expended for the estate, in payment of debts of the same, and to require proof, and to state the sum of such expenditures, and also to report a schedule of the liabilities of said estate, showing the kinds of liabilities, the several amounts with the names of the several creditors; also the debts (if any) unpaid, the names of the debtors from whom the same are due, discriminating and reporting such as are attestable, and such as are desperate.”

The petition of appeal filed in this court sets forth the following as grounds of exception to the decree of the Chancellor, viz:

“1st. That the presiding Judge held that the nuncupative will of William Dell passed neither real estate nor slaves; whereas it is insisted that by operation of law both passed by the said will.

“2d. That the presiding Judge erred in not decreeing that the personal estate which he decided did pass, passed as *specific legacies*, exempted from the payment of the debts of the said testator, and that said debts should be paid from

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the proceeds of the lands and slaves, which he decided did not pass, in the hands of an administrator to be appointed.”

From this statement of the case, it will be seen that two questions have been submitted by the complainant for the determination of this court, viz: 1st. Whether under the laws of Florida, real estate and slaves, or either and which will pass under and by virtue of a *nuncupative will*.

2d. Whether in the event that it shall be determined that the nuncupative will of William Dell did not operate to pass the real estate and slaves, so much as did pass, should not be considered as a *specific legacy*, and thereby throw upon the lands and slaves the payment of the debts of the estate.

The statute now of force on the subject of last wills and testaments, was enacted by the Legislature on the 20th day of November, A. D. 1828. The 51st section is as follows: “Every person of the age of twenty-one years, being of sound mind, shall have power by last will and testament in writing, to devise and dispose of his or her lands, tenements and hereditaments, and of his or her estate, right, title and interest in the same, in possession, remainder or reversion; at the time of the execution of the said last will and testament, and of the slaves which may be possessed by him or her at the time of his or her death; *Provided*, that every such last will and testament shall be signed by the testator, or by some other person in his or her presence, and by his or her express direction, and shall be attested and subscribed in the presence of the said testator or testatrix, by three or more witnesses, or else it shall be utterly void and of non-effect.”

The 52d section provides, that “no such devise or disposition of lands, tenements, hereditaments or slaves, or any part or clause thereof, shall be revocable by any other will or codicil, unless the same be in writing and made as afore-

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said; but every such last will and testament, devise or disposition, may be revoked by any other writing, signed by the testator or testatrix, declaring the same to be revoked, or operating as a revocation thereof by law, or by burning, cancelling, tearing or obliterating the same by the testator or testatrix, or by his or her direction or consent, or by the act and operation of law.”

The 53d section provides for the making of nuncupative wills, as follows: “No nuncupative will shall be good, that is not proved by the oaths of three witnesses at least, that were present at the making thereof, nor unless proved by said witnesses that the testator or testatrix, at the time of pronouncing the same, did desire the persons present, or some of them, to bear witness, that such were his or her will, or to that effect; nor unless such nuncupative will was made in the time of the last illness of the deceased.”

The 54th and 55th sections relate to the time for taking testimony as to such will, and the grant of letters and probate of the same; and the 56th section relates to revocation, and is as follows: “No will or writing concerning any goods or chattels shall be revoked, nor shall any clause, devise or bequest therein be altered and changed by any words, or will by words of mouth only, except the same be in the life time of the testator or testatrix committed to writing, and after the writing thereof, read unto the testator and allowed by him, and be proved to be done by three disinterested and credible witnesses at least.”

We have collated these several sections for the greater facility of reference.

In support of the position that *lands* may be passed by nuncupative will, we are cited by the counsel for the complainant to the act of the Legislature prescribing the mode in which lands may be conveyed by *deed*. Thomp. Dig. 177, §1. The argument is, that the exception in the section in

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favor of "last wills and testaments, or other testamentary appointment duly made according to law," affords sufficient ground for the position, and it is insisted that a nuncupative will which is reduced to writing after the death of the testator, is a "*testamentary appointment*" under the statute by which land may pass. This view of the statute was not much pressed by counsel, and we confess that we have been unable to perceive its force upon, or its applicability to the point at issue. To sustain the argument of the counsel would be to hold, that the *witnesses* to the nuncupative will were the *testamentary appointees* of the testator, and that he could do by *appointment* that which he was debarred by law from doing *directly* and *in propria persona*. A conclusion so illogical cannot be law.

It was further assumed that whatever might be the conclusion as to the passing of lands, there could be but little doubt respecting a nuncupative bequest of slaves, and the position was maintained with so much force and ability as to cause the court to give to the consideration of the point more than ordinary attention. It was insisted in this connection that under the rules of the common law, slaves come under the designation of personalty, and that such is their character by the express enactment of the Legislature, (citing Thomp. Dig., 183, sec. 4, par. 1,) wherein it is declared that, "from and after the passage of this act, slaves shall be deemed, held and taken as personal property, for every purpose whatsoever." It was insisted that this was an express legislative declaration on the subject, and that such an express declaration could not be affected by any mere implication; that as personalty, it stood upon the same footing as other chattel interests, and was the subject of a nuncupative bequest; that the 51st section of the statute, (Thomp. Dig., 192,) which assumed to give the power to make last wills and testaments of lands and slaves, was

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not designed to change the character of the latter, or to restrict the disposition of the same; but that the only purpose contemplated in bringing the two into such close juxtaposition, "was to show that the will was to operate only on such land and the testator might be seized of at the date of the will, and upon such slaves as he might be possessed of at the time of his death." This, if we understood the counsel, gives the full force of the argument as it was presented to the court. Before proceeding to consider this argument, it may be proper to note that the act referred to as designating the *character* of slaves, was approved on the 15th of November, and the other act giving the power to dispose of land and slaves, was approved subsequently on the 20th of the same month, A. D. 1828. It will also be noted that in the latter act there are no *negative* words used to enforce the restriction as to slaves, and that omission it is that gives rise to the question in this case. In this posture of the law, the court is charged with the important duty of ascertaining and declaring the legislative will on the subject, and we confess that the task is not free from embarrassing anxiety. The books have kindly furnished a body of rules which constitute the canons of construction, and to them resort is frequently had with the most beneficial and satisfactory results. But the experience of every lawyer demonstrates that these rules are merely arbitrary, and that cases are continually arising which defy their application. Such is the case before us.

In proceeding in this investigation, we will not discuss the point raised by the defendant at the argument, as to how far the declaration of the legislative will, defining the status of slaves as property, contained in the act of the 15th November, is to be considered as having been *modified* by the subsequent act of the 20th November. We leave that an open question, both acts having been passed at the same

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session. It is sufficient for the conclusion at which we have arrived, that the two sections originating this seeming conflict, are embraced in two separate and distinct enactments, embodying two separate and distinct subjects. The former act will be found to be on the subject of alienation of property by *deed*; the latter, the alienation by *will*. The Legislature might well be permitted to have intended to affix to slave property different and distinct characters as viewed in the two aspects, and to become the subject of alienation by the different modes of transfer. But it is insisted that the words contained in the act of 15th November, viz: "for every purpose whatsoever," are so broad and *explicit* that they may not be restricted or controlled by any *implication* arising from the juxtaposition before referred to, as existing in the act of 20th November. It is true that these words of the section are very broad and comprehensive, but it would be illogical to invest them with a breadth and comprehensiveness which would extend their scope beyond the subject to which they were designed to relate. That subject was alienation by deed, and did not refer to or embrace the subject of wills. The very plausible position then deduced from the argument, that express words are not to yield to mere implication, must fall to the ground, so far as it is designed to affect the point at issue.

We come now to the argument based upon the omission of negative words to *restrict* the willing of slaves to the particular mode prescribed in the act of the 20th November, and it is urged that this omission is significant of the intention of the Legislature to do no more than to declare what property should pass under the will; whether such as was in possession of the *date* of the will, or such as might be in possession at the death of the testator. But in reply it may be asked, *cui bono*? The law had long been settled and well understood that, in a general devise of lands, only such as

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were in possession of the testator at the *date* of the will would pass, while in a general bequest of personalty, all that was in possession at the *death* of the testator would pass. We are of the opinion, then, that some other motive must have operated to have induced the Legislature to take slaves out of the category common to personalty, and to place it in close juxtaposition with land. That motive we are of opinion was to place that species of property upon an equal footing with realty, and the following enactments confirm us in that opinion.

It will be seen by reference to the act of the 20th of November, before referred to, that no devise or bequest of lands or slaves can be *revoked*, unless the writing declaring the intention to revoke be executed and attested with all the formalities required to make the devise or bequest, while in the case of "*goods or chattels*," the revocation may be effected by merely reducing the words to writing in the life time of the testator, and having them *allowed* by him. In the latter case, no signing or attestation of witness is required, as is essential in the former.

Again, the same distinction is kept up with respect to the effect of the *probate* of wills intended to pass the two kinds of property. While the probate of a will of goods and chattels is declared to be conclusive of the validity of the same, that of one embracing lands and slaves is declared to be only *prima facie* evidence. Now, if it were not the design and intention of the Legislature to discriminate between slaves and other chattels, and to take that species of property out of the category of personalty, why this difference in the mode of *execution, revocation and probation*? There must have been a purpose, and that purpose is clearly indicated by the juxtaposition in which it is found.

In support of the position taken by the counsel for complainant, we have been cited to the case of Sampson vs.

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Browning, (22 Georgia R. 293,) which was a case where both land and slaves were conveyed by nuncupative will, and the court held that the slaves passed, but that the lands did not. It is a sufficient reply to that authority to remark, that the Legislature of the State of Georgia has never *enacted* a statute on the subject of wills, but have only *adopted* the British statute, in which, of course, none of the discriminations in favor of slave property, above referred to, are to be found. The case then is of no authority on the point under discussion.

The court has also been cited to the language of the North Carolina statute, which it is contended is even stronger than the language of our statute, and in that State it is asserted, there has never been any doubt but that slaves would pass by a nuncupative will. The language of that statute is as follows: "No last will and testament shall be good or sufficient in law or equity, to convey or give any estate, real or personal, unless such last will shall have been written in the testator's life time, and signed by him, &c." As in the citation from Georgia, it will be seen that in the North Carolina statute, there is no intimation of a purpose to *discriminate* between slaves and other personal property, and consequently the application of the authority is obnoxious to the same objection. We conclude then that it was the purpose of our Legislature in the enactment of the 51st section of the act of the 20th Nov., 1828, to withdraw slaves from the class of personalty to which they belong for ordinary purposes, and to place them upon an equal footing with realty, whenever a testamentary disposition is to be made of them; and there is good reason for this. The growth and progress of the "peculiar institution" in the Southern States, has inspired sentiments which impart to that particular species of property even a greater degree of

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permanence then is accorded to realty. It is the cherished subject of inheritance, and a man under the stress of adverse circumstances will strip himself of every other species of property, even the old "homestead," the scene of his early childhood, before he will consent to part with his slaves. A feeling of benevolence prompts him to maintain the integrity of the patriarchal relation, by transmitting them to the care and protection of the surviving family. With these views, therefore the court are of the opinion, that there is no error in the decree of the Chancellor, which declares that the land and slaves embraced in the nuncupative will of William Dell, deceased, did not pass by operation of the same, and that in respect to these, he is to be considered as having died intestate.

The next question presented at the argument for the consideration of the court, was as to the *character* of so much of the bequests as did pass under the will, whether the same were to be considered as *specific*, and thereby exempted from the payment of the debts, or *general*, and consequently subject to that charge.

A reference to the definitions of the two kinds of legacies, and especially to the language of the will, will leave but little room for doubt on this point. A regular *specific* legacy may be defined, "the bequest of a particular thing, or money specified and distinguished from all others of the same kind, as of a horse, a piece of plate, money in a purse, stock in the public funds, a security for money, which would immediately vest with the assent of the executor." 1 Roper on Leg. 191.

There may be a "specific bequest" of *general* personal estate, but to give the bequest that character, the same *incidents* must attach that occur in a bequest of money; the money must be so described by the testator as to empower the legatee to say to the executor, deliver the sum bequeath-

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ed to me, which is in a particular chest, bag or purse. The bequest of all a person's personal estate generally, is not specific; the very terms of such a disposition demonstrate its generality. But if A. bequeath to B. all his personal estate *at* C. or in a particular house or country, the legacy will be specific, for it is confined in its extent, and falls within the description before given of such a legacy. B. can say to the executor, deliver to me all of A's. personal estate *at* C. or in a particular house or country, for I am entitled to receive it *in specie*. *Ib.* 242.

Tried by these *tests*, there cannot be a shadow of doubt as to the *general* character of the bequest contained in the will of William Dell. But the specific object of the bequest "*in trust*" is equally significant. That object is declared to be first "for the payment of my lawful debts, and after that to convey, &c." Independent of the general principle respecting the assets out of which the debts are to be first paid, there is in this will a special *trust* for that purpose, and as nothing but the personal estate, other than slaves, passes by the will, the executor's duty is plain: to proceed to its application to that purpose. Should the assets in his hands be insufficient to pay all of the debts, the creditors will have a right to resort to the unadministered lands and slaves for the balance of their claims.

This disposes of the case, so far as the rights of the complainant are concerned, but a prayer for *indemnity* is interposed on the part of the defendant, which may deserve consideration.

The answer of the defendant sets forth that acting under the belief that the devise of the real estate was valid, he, with the consent and full approbation of his co-devisees, concluded to sell the lands belonging to the estate, for the purpose of paying off the debts, and asks that the said sale be either confirmed by decree of the court, or that he be al-

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lowed to retain the personal assets for the purpose of refunding the purchase money received for the same, and which has been applied to the payment of the debts of the estate.

It is very obvious, in view of the conclusion which has been reached respecting the devise of the real estate, that the court has no authority to adjudicate touching any interest connected therewith. The real estate belongs to the proper heirs of William Dell, deceased, and they are not now before the court. So far as the retention of the personal assets are concerned, for the purpose of indemnity, there can be no difficulty about it, as in the account to be taken, the defendant, under the order of reference, is to be allowed a credit for all proper disbursements which he may have made on account of the estate.

Let the decree of the Chancellor pronounced in this cause be affirmed, with costs.

MATILDA BROWN, ADMINISTRATRIX OF GEORGE L. BROWN, DECEASED, APPELLANT, VS. CHAMBERLAIN, MILER & CO., APPELLEES.

B., without any writing whatever, but verbally and by word of mouth only, assigned, transferred and delivered to three of his creditors, constituting the firm of C. M. & Co., a package containing notes, drafts, &c., for near \$20,000, *in trust*, to collect and distribute the proceeds, as far as they would go, *pro rata*, between the assignees and his other "Charleston creditors," making no conditions or reservations in his own favor: Held, that this assignment was valid and irrevocable from the time of its acceptance by the assignees; that the privity or consent of the creditors was not necessary; that such assent will be presumed till the contrary appears.

This case was decided at Tallahassee.

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A full statement of the case, and the evidence therein, will be found in the opinion of the court.

Banks & McLeod for appellant.

Sanderson and Daniels for appellees.

WALKER, J., delivered the opinion of the court.

The bill in this case was filed in the Circuit Court of the county of Alachua, to enjoin the collection and recover possession of a large number of notes, drafts and other evidences of indebtedness, amounting to nearly thirty thousand dollars, which Geo. L. Brown, in his lifetime, deposited with the defendants, as the bill alleges, for safe-keeping.

The defence set up in the answer is that the deposit was made by said Brown, not for safe-keeping but as collateral security to the debts he owed the defendants and his other Charleston creditors, and that said Brown verbally assigned, transferred and delivered said papers to defendants *in trust*, for the purposes aforesaid, on Sept. 21, 1857, in Charleston, and that defendants then and there accepted and assented to said trust, and from that time have held said notes, &c., for the purposes of said trust.

To determine the issue thus raised let us look to the evidence.

To support the allegation of the bill, that the deposit was a mere bailment for safe-keeping, we have the testimony of the following witnesses:

1st. Mr. Scott, a merchant of Newnansville, Florida, of which place Mr. Brown was also a citizen and merchant, states that he went from Newnansville to Charleston in company with Mr. Brown. "That the day after Brown deposited the notes with defendants, witness saw them in possession of Daniel Miler, one of the firm of C., M. & Co. and

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Miler, on that occasion, showed witness said notes, &c., and informed him that Brown had left said notes with them, (C., M. & Co.,) but that he, (Miler,) did not know for what purpose—supposed Brown wished to make some money arrangement with them on the papers.”

2d. Mr. Lewellen Williams testified that “he was the clerk of Brown in Florida; that he did not reach Charleston till some ten or fifteen days after Brown had been sick there; that after witness arrived in Charleston he made enquiries of Mr. Miler respecting Mr. Brown’s money and notes. Witness knew Brown had both money and notes with him when he left home; witness was his clerk and had delivered both to him. Miler told witness he had a package of Brown’s which he supposed to be notes. Miler showed them to witness and said Brown had been round visiting all the merchants, and on his return had left the notes with them for safe-keeping; that after Brown’s death, witness demanded the notes of Mr. Miler, and he refused, saying witness was no longer an agent or clerk of Brown after Brown’s death, but that when any person administered on the estate and called for the notes, they would be delivered to them. This Mr. Chamberlain also assented to.” “Witness demanded the notes of Miler at the Mill’s House in Charleston—never had any conversation with Mr. Isaacs about the notes.” (The firm consisted of Chamberlain, Miler & Isaacs.)

3d. Mr. Brown having died in Charleston, on the 8th of October, 1857, (seventeen days after the deposit was made,) his Charleston creditors, between the date of his death and the 30th of the same month, had a meeting, at which they appointed one of their number, Mr. O. J. Chaffee, to act as their agent. On the said 30th October, 1857, which was twenty-two days after the death of Mr. Brown, Mr. Chaffee wrote a letter to the widow of Mr. Brown, in which he said

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among other things, “these are matters appertaining to your and our interests, which require consideration, and while wishing to avoid too soon calling your attention to them, we would respectfully suggest, that your interests as well as those of Mr. Brown’s creditors require that no needless delay may be incurred in placing his estate under the best possible management. At a meeting of his creditors here (Charleston) it was resolved to appoint an agent to call upon and co-operate with you *in the appointment of such an administrator* as would best adjust and settle the estate, and I was named as the person to represent them. As soon therefore as it will suit your convenience to see me on said mission, I will take much pleasure in visiting Newnansville, and I trust that no difficulty will be encountered in selecting *such a person* as will do full justice to yourself as well as to the other parties interested. When Mr. Brown arrived here, he stated *that it was his purpose to provide for the full security of his Charleston creditors, and at the same time deposited a package of notes with the firm of C. M. & Co. He afterwards appointed a time for meeting with his creditors, but his sickness became so serious that it was deferred, and he never after was sufficiently able to carry out his purpose. The papers here will be safely cared for and delivered to the proper party when appointed.*”

Subsequently, when Mr. Chaffee visited Florida, he did turn over a portion of these papers to Mrs. Brown, who had been appointed administratrix.

Such is the testimony to support the allegation of a bailment for safe-keeping, and it is certainly entitled to most serious consideration.

This letter of Mr. Chaffee’s is, so far as we know, the first written testimony that was ever made concerning the deposit of these notes, and if we read it unassisted by other testimony, we certainly cannot conclude that when he wrote

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that letter, Mr. Chaffee knew that the notes were the property of Chamberlain, Miler & Co., in trust for themselves and the other Charleston creditors. He nowhere hints in this letter to Mrs. Brown that such is the fact, although it was written immediately after a meeting of Brown's Charleston creditors, and only twenty-two days after Mr. Brown's death, and although the notes were the special subject of the letter. On the contrary, he tells Mrs. Brown that the creditors at their meeting had appointed him their agent to co-operate with her in the appointment of *such an administrator* as would best adjust and settle the *estate*, "that the papers then (in Charleston,) would be safely cared for and delivered to the proper party when appointed. That when Mr. Brown arrived in Charleston, he stated that it was his purpose to provide for the full security of his Charleston creditors; and at the same time deposited a package of notes with the firm of C., M. & Co.; that he afterwards appointed a time for meeting with his creditors; but his sickness became so serious, that he never was sufficiently able to carry out his purpose."

Now, if Mr. Chaffee at that time considered that C. M. & Co., owned these notes as assignees, why did he not tell Mrs. Brown so? Why on the contrary did he tell her that the notes would be delivered to an *administrator* when appointed? If C., M. & Co., were the assignees, it was clearly their business to collect the notes, and distribute the proceeds according to the trust, and not allow them to be delivered to the administrator. To promise to deliver them to the administrator, would seem to be an acknowledgment that they were the property of the administrator, and to say to Mrs. Brown, that when Mr. Brown arrived in Charleston, he stated that it was his purpose to provide for the full security of his Charleston creditors, that he at the same time *deposited* the notes with C., M. & Co., and afterwards ap-

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pointed a meeting with his creditors, but was prevented by sickness and death from carrying his purpose into effect, was in the absence of explanation, to tell her it was Mr. Brown's purpose to use these notes in some satisfactory arrangement, which he hoped to make with his creditors at the contemplated meeting, but that his sickness and death defeated this purpose.

The letter of Mr. Chaffee is entitled to much consideration, because he appears from it to be a man of fine intelligence and kind and sympathetic feelings, and moreover, because he was in a position to know as much or more than any other man concerning the nature of the deposit. He was himself one of the creditors; he had seen Brown when he delivered the package to Isaacs, and had talked with both Brown and Isaacs about it. When he wrote the letter the subject was fresh in his mind, and the creditors had just had a meeting and appointed him their agent. At that meeting the matter of the assignment, if any there was understood to exist, was doubtless fully discussed. It is hardly possible that the creditors would fail to bring so grave a matter as the assignment directly to the attention of their agent; and besides, is it not singular, if an assignment was then understood to have been made to Chamberlain, Miler & Co., that they did not, *as assignees*, give a power of attorney to Chaffee to act for them in *that capacity*? They seem not to have done so. Mr. Chaffee, in his testimony, speaking of his visit to Florida, says he "was acting as agent," (not of the assignees,) but "of the Charleston creditors of Mr. Brown, among whom was the firm of C., M. & Co."

If we read Mr. Chaffee's letter in the light of his subsequent action in actually turning over to the Administratrix of Brown a portion of the notes contained in the package claimed to have been assigned, and also in connection with

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the testimony of Scott and Williams, herein before recited, we will be inclined to the opinion that the allegation of a mere deposit for safe keeping is sustained; and the more particularly when we remember that the habits of Mr. Brown at the time, were, unfortunately, such as to render such a deposit eminently prudent, and himself a very unsafe custodian of so large an amount of property, and moreover that an assignment of so great an interest in so loose a manner, is, to say the least of it, very unusual.

But let us give our attention now to the consideration of the testimony in favor of the defendant.

1st. In the first place we have the statements of the answer responsive to the bill, which are to be taken as evidence unless contradicted by two witnesses, or one witness and corroborating circumstances. See 2 Story's Eq. Jur., 1528.

The express allegation of the bill is that the notes were deposited with Daniel Miler, of the firm of C., M. & Co., *for safe-keeping*; that soon after the death of Brown, Miler admitted he held the notes on deposit, and agreed to deliver them to any legal representative when appointed. The fifth interrogatory of the bill, based on this allegation, is as follows: "Have you or not said notes in your possession now, or which or any of you? Was there any written assignment or transfer given you or any of you, by said Brown, deceased, and whether these notes were left with you for *safe-keeping*, or did you receive them in payment of any debt, and if so, were they all given for your debt, or were they to go to any other creditors of deceased, and if so, to which creditor? *State the bargain and transfer, if any such were made, specifically.*"

Directly responsive to this allegation and interrogatory, the defendants all answer upon oath, collectively and separately, that according to their and each of their knowledge, remembrance, information and belief, said notes, &c., were

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not left with them or either of them, for safe keeping, but were verbally assigned, transferred and delivered by Brown to Isaacs, one of said firm, to be by said firm collected, and the proceeds applied to the payment of the debts due from said Brown to defendants—all his other Charleston creditors in proportion to their respective amounts, so far as the amount realized therefrom would pay them, and for that express purpose and no other; that Brown stated at the time of this verbal assignment that he had talked with the other creditors and they assented to it; that the defendants then and there accepted the trust and received said notes for the purposes thereof, and have ever since, and do still hold them therefor.

In corroboration of these responsive statements of the answer, we have the testimony of Mr. O. J. Chaffee, Mr. A. F. Williams, Mr. Alfred Price and Mr. J. R. Robertson.

The testimony of Mr. Chaffee was admitted by consent, though he is one of the Charleston creditors interested in this suit. He testifies that on the morning of Monday, 21st September, 1857, he saw Mr. Brown in a chase in front of the store of C., M. & Co., when he handed a package of papers to Mr. Isaacs, one of the firm of C., M. & Co. Witness knew what purported to be in the package at the time of the delivery by Brown to Isaacs, and subsequently Brown informed witness that the package contained notes amounting to \$26,000, *which he had placed* as collateral security with C., M. & Co., to his Charleston liabilities. Witness did not see the package opened at the time of its delivery. He relies on what Mr. Brown and Mr. Isaacs told him to identify the notes. The testimony of Williams and Price is objected to before this court on the ground that they are interested. They state that they were Charleston creditors of Brown, but have sold out their claims to the other creditors, and therefore are not interested. Be this as it may,

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their testimony seems to have been admitted before the Circuit Judge without objection, and it is too late to object to its competency here, and there are no circumstances to make the court receive it with more caution than that which necessarily attaches to the testimony of all interested witnesses. Wilmans testifies that Brown, on the 21st Sept., 1857, told him that he *had lodged notes and assets for about \$30,000 with C., M. & Co., as collateral security for witnesses' firm and Brown's other creditors in Charleston*; that witness in consequence of the information received from Brown, enquired of C. M. & Co., whether the notes had been left, and was informed that they had; that Brown said at the same time that he intended to give *additional* security to his Charleston creditors. Price testifies the same as Wilmans, except that he says that Brown told him that the assets he had left with Chamberlain, Miler & Co., "*were sufficient to pay all he owed*" in Charleston, and does not say that Brown said any thing about giving *additional* security. This witness further says that soon after Brown left the store of Wilmans & Price, Mr. Miler, of the firm of C., M. & Co., informed witness "that the notes had been left as stated by Brown."

Mr. Joseph R. Robertson states that he is book-keeper for Horsey, Anton & Co., Charleston creditors of Brown; that on 21st September, 1857, he saw Brown at the store of said firm; that Brown called to arrange his liabilities; that he paid a small open account, and said that *he had left securities with Chamberlain, Miler & Co., for the purpose of paying his Charleston debts*; and among them his debt to F. M. Horsey & Co., and Horsey, Anton & Co., that Brown asked for and received a statement of his indebtedness to those firms.

We have had very great difficulty in sifting and weighing this apparently conflicting testimony. As we have before

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stated, the testimony of Scott and Williams as to the statements of Mr. Miler, taken in connection with the letter and subsequent action of Chaffee, would lead us strongly to believe that the deposit was a naked bailment. But, when we consider the oaths of all three of the defendants directly responsive to the bill that such was *not* the case, and that their testimony is corroborated by the subsequent declarations of Brown to Williams, Price, Chaffee and Robertson, we are now made to pause, and ask if there is no way in which these conflicting statements may be reconciled. It is certainly a powerful circumstance that in the life time of Brown, Mr. Miler said to Mr. Scott, that he did not know for what purpose the notes were left, and to Mr. Williams, that they were left for safe-keeping. But it is hardly possible that Brown's arrangement having been made with *Mr. Isaacs*, Mr. Miler was not informed of its real nature, or for some reason may have desired not to communicate it. It is also a powerful circumstance, that immediately after the death of Brown, seventeen days after the deposit was made, Miler told Williams the notes would be delivered to Brown's administrator, and that on the 30th October, twenty-two days after Brown's death, Mr. Chaffee, the agent of the creditors, should have written the same thing to Mrs. Brown, and afterwards have followed it up by actually turning over to the Administratrix a portion of said notes. But, Mr. Miler, in the answer of defendants directly responsive to the fourth interrogatory of the bill, denies positively that he ever did promise to deliver those notes to Brown's legal representative; and Chaffee testifies that he "gave up the unnegotiable notes to Mrs. Brown to conciliate her, and because he was doubtful whether they could be collected without being duly endorsed, and further, because he considered them of little value." Mr. Chaffee further testifies, that after Brown told him he had placed the notes as collateral, &c., he

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Brown agreed with witness, that he would give, *in addition* to the collaterals, a mortgage on his real and personal property in Florida to cover his *entire* indebtedness to his Charleston creditors; that witness employed a solicitor to consummate this agreement with Brown; that this arrangement was not effected owing to the illness of Mr. Brown; that he was taken ill the night previous to the day fixed for the consummation of this arrangement.

Here, possibly, may be an explanation of that part of Mr. Chaffee's letter in which he says Brown's sickness and death prevented his carrying out his design in providing a *full* security for all his Charleston creditors. Take the latter alone, and it would appear that the notes were "*deposited*" with the view to some subsequent arrangement to provide for the full security of all his Charleston creditors; but take the letter in connection with the writer's testimony, and it may mean that the notes were deposited in trust for his creditors; so that part of the business was completed, and it was only the intention to give *additional* security that was defeated. In concluding our remarks on the letter of Mr. Chaffee, it is but fair to state also that he says he "*caused*" that letter to be written, and the writer may not have expressed the views of Mr. Chaffee as lucidly as he might have done himself, and although the letter promises to deliver the papers without qualification, yet Mr. Chaffee may have intended to impose upon the delivery the conditions which he actually afterwards imposed, to-wit: the payment of sixty per cent. of the amount due the Charleston creditors.

After the most thorough and patient investigation, therefore, we have concluded that the preponderance of the testimony is in favor of the fact, that Mr. Brown did, on the 21st September, 1857, make to C., M. & Co., a verbal assignment of the note in controversy *in trust*, to collect and distribute

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the net proceeds among all his Charleston creditors, in proportion to their claims, as far as said proceeds would go.

But it is contended, even supposing this verbal transfer to have been made, that the mind of Mr. Brown was not in a condition to transact business, and that the verbal assignment, if any such was made, is therefore void.

On this point we have no difficulty. The testimony of Dr. Fitch and four other witnesses satisfies us that on the 21st Sept., 1857, when the assignment is alleged to have been made, Mr. Brown was in his right mind and capable of making a valid assignment.

The next question naturally arising in this case is, can a party make an assignment without writing which will be enforced? The answer to this question seems to be that in *general* assignments, or those usually executed by insolvent debtors, a writing of some kind is always required, but in special or particular assignments a mere delivery of the subject assigned is sufficient to pass the property, and in equity many assignments are held good which are not evidenced by any writing. Burrell on Assignment, pages 92-'3. See also Hutchins vs. Low, 1 Green., (N. J., 246,) and Edison vs. Frazier, 4 English, (Ark.,) 220, 221; Boyden vs. Moore, 11 Pickering, 362; Loftus vs. Lyon, 22 Alabama, 540; Higgenbottom, vs. Peyton, 3 Richardson's Equity, 398; Gordon vs. Green, 10 Georgia, 534; Dix vs. Cobb, 4 Mass., 50-511; White vs. Hunt, 1 Hill, (So. Ca.,) 187; 16 Johnson's Rep., 54; Jones vs. Winter, 13 Mass., 304; Ford vs. Stewart, 19 Johnson's Rep., 344; Prescott vs. Hull, 17 J. R. 17, 284; Canfield vs. Mungen, 12 John., 346; 1 Cain's R., 363; 3 J. R., 71; Alexander vs. Adams, 1 Scrob. Law, R., 47; Maybin vs. Kerby, 4 Richardson's Equity Repts., (So. Ca.,) 105; 1 Browne C. C., 269; Reed vs. Simmons, 2 Dess, 552; Welsh vs. Usher, 2 Hill Ch., 17 and 421.

"A *special* or *particular* assignment is one which is made

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directly to the creditor in payment or as security,” and “a *partial* assignment is an assignment of a portion of the debtor’s property in trust for the benefit of his creditors.” Burrel on assignments, 101. The assignment under consideration partakes of the nature of both. It is a special or particular assignment, inasmuch as it is made directly to the creditors constituting the firm of C., M. & Co., in payment or as security for themselves and other Charleston creditors, and it is also a partial assignment, as it is an assignment of a portion of the debtor’s property for the benefit of his creditors. We hold, therefore, that the rules of law concerning both special and partial assignments are applicable to this case.

Again, it was urged in argument by the learned and industrious counsel for complainant, that this assignment is void by reason of the want of the assent of the creditors before the death of the assignor, that it was revocable by the assignor in his life, and was revoked by his death, and furthermore that it is void for its uncertainty.

“It appears to be a settled rule in our law on the subject of the assent of creditors to the assignment, that assignments *directly* to the creditors are not valid without their assent; but that assignments to *trustees* for their benefit, do not require such assent to render them valid and operative. A different rule prevails in England, and hence has arisen a material distinction between the forms of assignment in use in the two countries in regard to their legal qualities and effect as modes of provision for creditors. In the United States a common form of assignment, (if not the prevailing form,) is that of two parts, executed between the debtor or assignor of one part, and the assignee or trustee of the other part, without any creditor becoming a party; and such an assignment on its acceptance by the assignee, is held to be valid and effectual as a provision for creditors, creating a

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trust for them, which can be enforced in the proper courts, and is *irrevocable* by the assignor. But in England, assignments in this bi-partite form, to which no creditor is a party, are called *deeds of agency*, or voluntary deeds of agency, which create no trust for creditors such as they can insist on being enforced, but are revocable at the pleasure of the debtor." Burrel on Assignment, 91-92. See remarks of Pearson, J., in Stimson vs. Fries, (2 Jones' Equity, 156, North Carolina) and Ingram vs. Kirkpatrick, 6 Ire. Eq., 463.

In England, assignments to which no creditor is a party, are called *deeds of agency*, and are revocable by the assignor until communicated to, or assented to by the creditors; but if the assignee be a *creditor*, the assignment is irrevocable as to him. See Mackinnon vs. Stuart, 20 Law J. Rep., (N. S.) Chanc., 49, and the later case of Seggers vs. Evans, 32 English Law and Equity, 139.

But in the United States, as before stated, "it is a general rule, that when the assignment is to a trustee for the benefit of creditors not parties to the deed, the assent of the creditors is not necessary to its validity, and the legal estate or title will pass to the assignee without such assent, so as to prevent a judgment creditor from acquiring a lien, if real, by his judgment, or if personal by his execution, unless upon the ground of fraud. This rule is said to be founded upon the established principle of the common law; that it is not necessary to the creation of a trust, by deed in favor of any person, that the *cestui que trust* should either be a party or assent to it. If the trust be for his benefit, the law *presumes* his assent to it until the contrary is shown; and it is clear that trusts may lawfully be created where there can be no present assent, for they may be in favor of persons not in existence. It is sufficient in general that in such cases there

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is a competent grantor to convey, and a competent grantee to take the property. Deeds of trust, observes Chief Justice Marshall, are often made for the benefit of persons who are absent, and even for persons who are not in being; whether they are for the payment of money, or for any other purpose, no expression of the assent of the persons for whose benefit they are made has ever been required as preliminary to the vesting of the legal estate in the trustee. Such trusts have always been executed on the idea that the deed was complete when executed by the parties to it. From these views, the rule has been deduced and very clearly laid down by Mr. Justice Story, in the leading case of *Halsey vs. Whitney*, that in case of an assignment to a trustee for the benefit of creditors, 'when the trust is for the benefit of all, and no release or other condition is stipulated for on behalf of the debtor, but the property is to be distributed equally among all the creditors, *pro rata*, the assent of the creditor must be *presumed*; for the trust cannot be for his injury, and must be for his benefit; it must always be for his benefit to receive as much of his debt as the debtor can pay. If then, in such a case, such an assent be necessary, it may be *inferred* as a presumption of law until the contrary is shown.' That which purports to have been done for the benefit of creditors, observes Mr. Justice McLean, in the case of *Lawrence vs. Davis*, 3 McLean 177, and which was manifestly for their advantage will be presumed to have been done with their assent unless the contrary appear. The same rule has been approved by the Supreme Court of the United States, (*Brooks vs. Marbury*, 17 Wheaton 7, and *Brothers vs. West*, 7 Peters, 608-613,) and in the case of *Thompkins vs. Wheeler*, (16 Peters, 118,) this rule was expressly applied to the case of an assignment *directly* to creditors; the court observing where the deed is absolute on its face without any condition whatever attached to it, and is

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for the benefit of the grantees, the presumption is, in the absence of all evidence to the contrary, that the grantees accepted the deed." (Burrel on assignments, 331-332.)

It is not necessary for this court to determine at present whether they do or do not approve of the ruling of the Supreme Court of the United States in Tomkins vs. Wheeler, but we unhesitatingly follow the current of American authorities, and therefore declare, that in the case under consideration, no express assent of or notice to the creditors, was necessary. And even though we should follow the English rule that the assent, or at least the privity of the creditors is necessary, it would make no difference in this case, as the statement of the answer, responsive to the bill, is, that Mr. Brown told defendants, at the time the assignment was made, that he had talked with the creditors and they agreed to it. On the subject of the revocability of assignments, Mr. Burrel, in his work on Assignments, remarks as follows: "In England the doctrine seems to be now established that instruments of provision for creditors, corresponding with our deeds of assignment, to which no creditor is a party or privy, are revocable at the pleasure of the assignor. But in the United States, where, as a general rule, the assent of the creditors or their union as parties to the assignment is not necessary to its validity, the prevailing doctrine is that an assignment in trust for the creditors, executed and delivered, by the assignor and accepted by the assignee, creates *at once* the relation of trustee and *cestui que trust* between the assignee and the creditors, and cannot be revoked by the assignor or annulled by the joint act of the assignor and assignee." Burrel on assignments, 458; Ingram vs. Kirkpatrick 6, Iredell's Eq., 462.

This court, following the American rule, holds that the assignment in this case was not revocable by Mr. Brown in his lifetime, because it had been accepted by the assignees,

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and there was at once created the relation of trustee and *cestui que trust* between them and the creditors. But even under the English rule it was not revocable, because the assignee in this case not only accepted the trust, but there had been communication and privity with the creditors, as according to the declaration of Brown to the assignees, he had talked to the creditors about the assignment and they agreed to it.

The only question now remaining for this court to consider, is whether the assignment is void for uncertainty. We are of opinion that it is not. The assignor, the assignees, the property assigned, the class of creditors for whose benefit the assignment was made, and the interest they respectively took in the property assigned, are all stated with sufficient certainty. Where the property assigned is *delivered* at the time of the assignment, no schedule of it can be necessary to know with certainty what was intended to be assigned, and it is not unusual in assignments to name a *class* of creditors for whose benefit the assignment was made, without naming each individual creditor and the amount due each. "In a late case in New York it was held that a provision in an assignment directing the assignees, out of the net proceeds and avails of the assigned property, to pay to the *laborers* and workmen of the assignors, residing in Albany and Buffalo, the amount due to them respectively for work and labor done for the assignors, would not avoid the assignment, although the names of those creditors, with their places of residence and the respective amounts due to each, were not mentioned." *Bank of Silver Creek vs. Talcott*, 22 Barbour, 550.

We have now gone through with the consideration of all the points in this case deemed proper to its adjudication, and though we much regret the apparent looseness with

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which so important an assignment was made, we are yet compelled, by our views of the testimony and the law, to affirm the decree of the Circuit Judge.

Let the decree be affirmed with costs. *Per curiam.*

FRANCIS BRIDIER, EX'R OF SUSAN MURPHY, DECEASED, APPELLANT, VS. DAVID L. YULEE, CAVEATOR, APPELLEE.

1. It is within the *province* of the Supreme Court, upon appeal or writ of error, to look beyond the bill of exceptions and to consider errors apparent upon the face of the record ; but to induce the court to reverse a judgment for an error not embraced in the bill of exceptions, or not properly assigned requires a strong case, and one showing that it will be manifestly against right to permit the judgment to stand.
2. The act of 1852-'3 (Pamp. Laws, 100,) makes it the duty of the Supreme Court to review the rulings of the Circuit Courts upon motions for new trials.
3. Where the record shows that there was a total absence of evidence to support the verdict, the Supreme Court will not hesitate to set the verdict aside ; but where there is *conflicting* evidence, the preponderance against the propriety of the verdict must be very strong to induce the court to interfere.
4. Although a witness, incompetent through interest, be improperly permitted to testify at the trial, yet, if it appear from the record that the testimony of the witness is so abundantly corroborated and sustained by the testimony of other witnesses as to make it improbable that the jury were *misled* by the testimony of such witness, so as to cause them to make a finding which they would not otherwise have made, the verdict will not for that cause be disturbed.

This case was decided at Jacksonville.

The statement contained in the opinion of the court is sufficient for the understanding of the points therein decided .

Geo. R. Fairbanks for appellant.

F. I. Wheaton for appellee.

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DUPONT, C. J., delivered the opinion of the Court.

This was an issue of *devisavit vel non*, tried in the Circuit Court of St. Johns county, and arose upon an attempt to set up a certain paper writing, purporting to have been executed by Susan Murphy, deceased, and to establish the same as her last will and testament. The caveator rested his defence upon two grounds, viz: Want of mental capacity, and undue influence. To establish and rebut these grounds, a large amount of evidence was adduced on either side. The jury by their verdict sustained both grounds, and thereupon the court pronounced as its judgment, "that the said will of June 4th, A. D. 1856, be held and declared invalid and of no effect." The counsel for the propounder of the will, then moved the court to grant a new trial, upon grounds which will hereafter be stated. The motion for the new trial was denied, and thereupon an appeal was taken, which brings the proceedings before this court for review.

The errors assigned in this court are as follows, viz:

"1st. In allowing the testimony of Miss Striska to go to the jury, she having an interest under a former will and codicil, purporting to have been executed by the testatrix, Susan Murphy *alias* Susan Linde.

"2d. The testimony was irrelevant, and in other respects legally inadmissible.

"3d. In allowing the former will, codicil and deeds of trust to be read as evidence to the jury, inasmuch as the only question raised in the cause by the pleadings is *devisavit vel non*, to wit: want of capacity to make a will, and undue influence brought to bear upon the mind of the testatrix, at the time of its execution or prior thereto.

"4th. The court erred in refusing to grant a new trial upon the grounds stated in the motion.

"5th. The court erred in sustaining one part of the verdict of the jury and overruling the other."

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In looking into the bill of exceptions as presented in the record, it will be readily perceived that it affords no ground on which to base the first, second, third and fifth errors assigned. The basis of the first error is the admission of the testimony of Miss Striska. It appears that when the deposition of this witness was offered at the trial, it was objected to by the counsel for the propounders of the will, but the *ruling* of the court, which permitted it to be read, does not appear to have been *excepted to*, and there is no general *exception* made, as is usual in the preparation of a bill of exceptions. The second, third and fifth errors are in the like category with the first, there being no exception, either special or general, to any of the rulings of the court, upon which these several errors are attempted to be predicated. Indeed, the only exception that seems to have been even *noted* to any of the *rulings* of the court, is the one which forms the predicate of the *fourth* assignment, to wit: the refusal to grant a new trial.

Before proceeding to consider the point involved in the fourth assignment, which is the only one that is properly presented for our consideration, it may not be improper to note the mistake of fact that occurs in the statement of the *third* assignment. It is made a ground of error in that assignment that the court allowed the "former will and codicil" to be read in evidence. The report of the trial, as it appears in the bill of exceptions, shows the reverse to have been the fact; for it is there stated that "the reading of the former will of Mrs. Murphy was objected to, and *objection sustained by the court.*" With respect to the fifth assignment, we have been unable to find in the record anything to sustain the allegation, that the court "sustained one part of the verdict and overruled the other."

We have intimated that the point raised by the fourth assignment, to-wit: the propriety of the refusal to grant

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a new trial is the only one that has been properly presented for our consideration. In making this remark, we are not to be understood as holding that we are to be limited and restricted to the errors specially assigned. In the case of *Proctor vs. Hart*, (5 Fla. Repts., 465,) it was held that, upon writ of error it was the *province* of the court to look beyond the bill of exceptions, and to consider errors apparent upon the face of the record. Such was the ruling in that case, and it meets our entire approval; but to induce the court to reverse a judgment for an error not properly assigned, requires a strong case, and one that shows that it will be manifestly against right to permit the judgment to stand. Such is not the case presented by this record, and we shall therefore confine our investigation to the matter of the new trial.

The grounds for the motion for the new trial are as follows, viz:

“1^{ts} Because the verdict of the jury is contrary to the evidence, and the weight of the evidence.

“1st. Because the verdict of the jury is contrary to the charge of the court.”

Prior to the passage of the act of 1852-3, (Pamp. Laws, 100,) this court, entertaining the English doctrine, invariably refused to interfere with the *discretion* of the inferior courts in granting or refusing to grant a new trial. In the celebrated case of *Carter vs. Bennett*, (4 Fla. Repts., 284,) which was decided at the January Term, 1852, the refusal to grant a new trial was made one of the main grounds upon which the reversal of the judgment was claimed; and it was argued with great skill and ability. The court, however, refused to sustain the point, saying: “The whole framework of our judicial structure is derived from our English forefathers, and the practice of reviewing the decisions of a court, upon motions for a new trial, is wholly unknown to

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the judicial system of that country. Such, also, is the case with the courts of the United States; while the courts of the several States seem to be about equally divided upon the question." This decision doubtless suggested the enactment of the statute just referred to, which provides that "all orders and judgments of the Circuit Courts of this State, made and passed in any cause therein, wherein the said court shall allow and grant, or shall refuse to allow and grant, any motion for new trials, or any motion to amend the pleadings, or to file new or additional pleadings, or to amend the record of any cause during the term of the court in which it was determined, or shall refuse to allow and grant a motion for continuance of the cause, shall and may be assigned for matter and cause of error, upon any writ of error sued out or appeal taken to the Supreme Court; and the said Supreme Court shall hear and determine the matter so assigned for error, in the same manner, and under the like rules and regulations as in other cases."

Thus it will be seen that the Supreme Court is not only invested with authority, but it is made its duty to consider and pass upon matters occurring in the progress of a trial below, which therefore had been esteemed to be a matter of pure *discretion*, and consequently not subject to be reviewed by the appellate tribunal. In matters of this kind, involving the sifting of evidence, the Appellate Court is required to assume the position of the Judge who presided at the trial of the cause; but it is very manifest that its facilities for arriving at a correct conclusion are greatly diminished by having to rely only upon the report of the evidence as it is set forth in the record. In the opinion delivered in the case just cited, the late Chief Justice Anderson, adopting the language of an eminent jurist, thus forcibly alludes this to disparity: "Every one at all familiar with the incidents of

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a jury trial, must admit the impossibility of conveying to an appellate tribunal, a perfect transcript of the evidence given to the jury. The tongue of the witness is not the only organ for conveying testimony to the jury; but yet it is only the *words* of a witness that can be transmitted to the reviewing court, while the story that is told by the manner, by the tone and by the eye of the witness, must be lost to all but those to whom it is told. The testimony of one witness, given with calm self-possession, an erect front, and an unhesitating accent, imports verity as strongly as a record; while the confusion, the hesitation, and the trembling of another, will contradict to the eye, what his faltering tongue has uttered to the ear. Yet the testimony of each will stand alike before the court of review." This language is as forcible as the sentiment that it inculcates is true, and is a salutary admonition to all appellate tribunals of the caution that should be observed in dealing with matters of evidence. Where the question is, whether *any* evidence has been adduced, upon which the verdict could be found, the disparity of facilities for determining is not so great, but when it turns upon the *weight* of evidence, involving nice scrutiny, close sifting and accurate balancing, it must be admitted that the Judge who presided at the trial has greatly the advantage. Hence, where the record shows that there has been evidence adduced on both sides, and the application for the new trial is grounded on the preponderance of the same, there must be presented a very flagrant case of injustice to induce this court to interfere with the ruling of the court below. This record does not present such a case. There was a large amount of evidence adduced on both sides, applicable to the points in issue between the parties, and without going into a detail of the same, we are not prepared to say that the preponderance was not in favor of the verdict.

Mr. Graham, in his elaborate and masterly treatise, lays

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down the following rules to be observed by courts in considering motions for a new trial:

“1st. The verdict must be presumed to be right, until the contrary appears.

“2d. The verdict should be sustained by the court, if the evidence, by any fair construction, will warrant such a finding.

“3d. A court is not authorized to set aside a verdict, simply because if they had been on the jury they would have found a different verdict.

“4th. It is not sufficient that the verdict may possibly be wrong, but that after giving a proper weight to all the evidence, it cannot be right.” 3 Graham on N. T., 1239.

If these are the rules prescribed for the government of the Judge before whom the trial is conducted, and who usually has the witness in his presence and under his eye, with how much more stringency do they address themselves to the observance of the Appellate Court. In the case of Sanderson & Co. vs. Hagan & Harrison, this court did exercise the prerogative of setting aside a verdict and granting a new trial; but it will be seen by reference to the case, that it was done upon the ground that there was a total absence of evidence to support the finding. Justice Pearson, then on the bench, in delivering the opinion of the court, remarked: “However disinclined we are to invade the proper province of the jury in estimating the force and effect of testimony, this is a case of too glaring a departure from all legal principle for the verdict to be permitted to stand. There was no testimony whatever to support the idea that the ‘cubic rule’ was the prevailing and customary mode of measurement,” &c. 7 Fla. Repts., 318.

In the case of the Tallahassee Railroad Co. vs. Macon, the court refused to disturb the verdict, and the same Justice, delivering the opinion of the court, remarks: “It was not for the Judge, after the verdict, to measure precisely

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the degree of weight which each particular statement of fact must, per force, have on the mind of the jury, and striking a balance between the two, to set aside the verdict, or render judgment as the balance may fall on the one side or on the other. When there is conflicting evidence and the verdict is not manifestly against the weight of evidence, the court will not interfere to set aside the verdict of a jury." 8 Fla. Repts., 299.

Controlled by the principles thus clearly enunciated, and applying them to the evidence contained in the record, we are constrained to sustain the propriety of the ruling in the court below, upon the motion for a new trial.

We are not prepared to say that all the evidence adduced by the Caveator was admissible. Indeed we are rather inclined to the opinion that Miss Striska was incapacitated by interest to be a good witness; but her testimony was so abundantly corroborated and sustained by the other witnesses, that we do not think it had the effect to *mislead* the minds of the jurors, so as to cause them to make a finding which they would not otherwise have made.

In enunciating the conclusion at which we have arrived, it has been deemed unnecessary to array the evidence contained in the record, or to bring it under review in this opinion. It is enough to say, that upon the whole evidence, we think the Judge below might very properly have refused to grant the motion for the new trial.

The second ground assigned in the motion for the new trial, to-wit: that "the verdict of the jury was against the charge of the court," was not pressed at the hearing; nor do we attach any importance to it, coming to the conclusion that we have.

It is ordered and adjudged that the judgment of the court below, rendered in this cause, be and the same is *affirmed*, with costs.

Lyman, Sears & Co. vs. Alexander.—Statement of Case.

LYMAN, SEARS & CO., APPELLANTS, VS. MARK ALEXANDER,
APPELLEES.

Fraser for appellant.

Fleming for appellee.

DUPONT, Chief Justice:

This suit was brought in the Circuit Court of Duval county, by process of attachment. Before the defendant had pleaded to the action, the attachment was dissolved, and from the order dissolving the attachment, this appeal has been taken.

The statute (Thomp. Dig. 370, § 5,) provides that when any suit shall hereafter be commenced by attachment, and the same on motion dissolved before plea to the action, then in every such case the suit shall abate and be dismissed from the court, &c.

Here the attachment was dissolved before plea to the action, but, *non constat* that the suit had been actually dismissed.

To accomplish that end, it requires the appropriate *judgment* of the court. No such judgment appears in the record, and until such final judgment, the cause remains in court. The order dissolving the attachment being only interlocutory, and the appeal being based thereon, this court has no jurisdiction of the same.

This view of the case relieves the court from considering the validity of the appeal bond, which was raised by the motion to dismiss.

It is therefore ordered that the appeal taken in this cause be dismissed for want of jurisdiction.

Harrell vs. Durrance.—Statement of Case.

JAMES M. HARRELL, APPELLANT, VS. FRANCIS M. DURRANCE,
APPELLEE.

1. Where a party applies in a civil suit for a continuance for *the term* on the ground of the absence of a witness, it must be shown by affidavit that the witness has been duly served with a subpoena, or a satisfactory reason assigned for the omission; that he is absent without the consent of the party, directly or indirectly given; that he resides in the county where the suit is pending, or if out of the county, good cause must be shown for not taking his deposition; that the testimony is material; that the applicant expects to procure said testimony at the next term; that the application is not made for delay only; that he cannot safely proceed to trial without the evidence of said witness; and the party must further state the facts expected to be proved by said witness.
2. It is not error for the court to refuse to allow a motion for the continuance of the cause, where the affidavit in support of it does not come up to the above rule.
3. A party need not set forth the very words of a note in the declaration; he may, if he chooses, set forth what he considers the substance and legal effect of the note in this respect, and where he professes to give the legal effect and operation of the instrument declared on, and he does not make the legal effect, there is no variance.
4. Where the promise is to pay interest from day in a promissory note, it draws interest from the date thereof, and an averment "with interest from date," gives the true legal effect and operation of the instrument.
5. The rule of law briefly expressed is, that "parol contemporaneous evidence is inadmissible to contradict, or vary the terms of a valid written instrument" Under this rule, all oral testimony of a *previous* colloquium between the parties, or of conversation or declarations at the time when it was completed or afterwards, is rejected.
6. Parol evidence is sometimes admissible where the language of the instrument is applicable to several persons, to several species of goods and chattels, &c., or the terms be vague and general, &c.
7. In a written bill of sale of cattle, where the marks and brands of the cattle are expressed, the maxim, "*expressio unius est exclusio alterius*," (the express mention of one thing implies the exclusion of another,) is applicable. The presumption is, that having expressed the marks and brands of some, they have expressed all which they intended.
8. The plaintiff in the court below having read to the jury a promissory note, with a credit indorsed thereon, it is to be taken as an admission of the plaintiff that the credit should be allowed.
7. The Circuit Court, on a motion for new trial on the ground the jury have given excessive damages, should look into the evidence and see whether the

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damages are excessive, and if so, either grant a new trial, or grant a new trial unless within a time to be fixed by them, the plaintiff remit so much as shall reduce them to the true sum.

Appeal from Hillsborough Circuit Court

This case was decided at Tampa.

A full statement of the case is contained in the opinion of the court.

James T. Magbee for appellant.

Gettis & Mitchell for appellee.

FORWARD, J., delivered the opinion of the court.

The appellee brought his action of assumpsit in the court below, upon a promissory note in words and figures as follows, viz: "On the first day of July next, I promise to pay Francis M. Durrance or bearer, seven hundred dollars for value received of him, this 13th day of November, A. D. 1858, with interest from day."

The declaration set forth, "that whereas the defendant on the 13th day of November, in the year of our Lord one thousand eight hundred and fifty-eight, made his certain promissory note in writing, and delivered the same to the plaintiff, and thereby promised to pay to the plaintiff or bearer the sum of seven hundred dollars, with interest from date, on the first day of July next, after the date thereof, which period has now elapsed."

To which declaration the appellant filed six pleas. The first plea avers that said promissory note in said declaration mentioned was obtained "by fraud, covin and misrepresentation, that is to say, by the said plaintiff, and others in collusion with him, falsely and fraudulently representing to the said defendant that the whole and entire stock of cattle, and interest in cattle of the plaintiff, then running in the

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woods or range, contained numbers sufficient, at the customary prices of stock cattle per head, to be worth, and that the same were worth five thousand dollars, and the said defendant, confiding in the representations of the plaintiff and others in collusion with him, for and in consideration of the said stock of cattle and interest in cattle of plaintiff, did give to the plaintiff for the said stock of cattle and interest in cattle of plaintiff, five thousand dollars, as follows, to wit: three negroes for the sum of three thousand and three hundred dollars, and two promissory notes signed by the defendant, and made payable to the plaintiff—one for one thousand dollars and the other for seven hundred dollars, the last mentioned promissory note being the one in plaintiff's declaration mentioned; and the said defendant saith that the said stock of cattle and interest in cattle of the plaintiff then running in the woods or range, did not contain numbers sufficient, at the customary prices of stock cattle per head, to be worth five thousand dollars, as by the said plaintiff and others in collusion with him fraudulently represented to this defendant. And the said defendant saith that after he had learned of the fraudulent representations of plaintiff, and others in collusion with him, he, the defendant, offered to return said cattle to plaintiff in the same manner as they were delivered to him to wit: running in the woods or range, and to rescind said contract and sale, and the said plaintiff fraudulently refused and still refuses to receive the cattle and rescind the said contract, wherefore," &c.

The 2d plea sets forth the representations as to value of cattle, the purchase, execution of the note, &c., as in first plea, and avers that said stock of cattle and interest in cattle, did not turn out to be worth *five thousand dollars* as represented, &c., wherefore the consideration of the said promissory note hath *partially failed*.

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The 3d plea sets forth the purchase of the cattle, the representations as to value, and alleges that the cattle were not worth more than the price and value of said three negroes, to wit: thirty-three hundred dollars, and that the said defendant hath now in his possession the said three negroes, wherefore the said defendant saith that the *consideration for said note has failed. &c.*

The 4th plea avers that there was *no consideration* given for the said promissory note.

The 5th plea sets forth the purchase of said cattle, the representation that the said stock of cattle was worth five thousand dollars, and that the plaintiff further represented that he, the said plaintiff, had not sold any steers out of said stock, except a few to one Willoughby Tillis, when in truth the said plaintiff had sold steers out of said stock of cattle to one Jacob Summerlin, &c.

The 6th was a plea of payment.

The pleas were all demurred to, and the demurrers overruled, with the exception of the demurrer to the fifth, which was considered good and well taken.

General replications concluding to the country were put in to the said 1st., 2d., 3d., 4th., and 6th pleas, and it was upon the issues thus joined the cause went to trial.

Before going into the trial, the defendant moved for a continuance, on affidavit, of absence of witness, which continuance was denied, and the ruling of the court thereon excepted to.

The following evidence, as appears by bill of exceptions, was adduced, to wit:

Be it remembered that when this cause was called for trial, the defendant moved this court for a continuance, and presented to the court the affidavit of defendant in support of his motion, which affidavit is marked filed on the seventh

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sel; the objection sustained, and defendant, by counsel, excepted.

William S. Spencer, Tax Assessor and Collector, was asked the following question, viz: "State whether or not plaintiff paid any taxes for Lucy Ann Durrance for the year 1858," which was objected to; objection sustained, and defendant, by counsel, excepted. The said Spencer was asked to "state whether or not any person paid taxes for Lucy Ann Durrance, for cattle, for the year 1858," which was by plaintiff's counsel objected to; the objection was sustained, and the defendant, by counsel, excepted.

Defendant then introduced Jesse Durrance as a witness, and asked him "how many horses, asses, mules, sheep, swine, and other stock had plaintiff, except horned cattle, in 1858," which was objected to, objection sustained, and defendant, by counsel, excepted. And this witness was also asked by defendant to "state whether or not plaintiff purchased any of the stock that he had sold defendant, back from Sloan," which question was objected to; the objection was sustained, and the defendant, by counsel, excepted. And defendant also excepted to the several rulings of the court in refusing to grant a new trial in said cause, upon the grounds and reason assigned by defendant for a new trial, filed with the clerk, and the said defendant prays that this, his bill of exceptions, may be signed, sealed, and made a part of the record in this case; which was done.

The plaintiff's attorney asked the court to instruct the jury that unless the defendant has proven that the promissory note sued upon was given for the stock of cattle here in controversy, then they ought to find for the plaintiff; which instruction was given.

The court instructed the jury, that in order for the defendant to sustain his plea of fraud, the first plea, he must have proved that the plaintiff fraudulently represented to

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the defendant that the whole and entire stock of cattle, and interest in cattle of plaintiff, remaining in the woods or range when the defendant purchased the cattle from the plaintiff, contained numbers sufficient, at the customary prices of stock cattle, per head, to be worth five thousand dollars.

If they find from the evidence there was such a fraudulent representation, and that the defendant, as soon as he reasonably could after finding such representations were false, offered and attempted to rescind the contract and return the cattle, then they should find for the defendant. But if they find that the plaintiff made such representations as to the number of the cattle which were incorrect, but the plaintiff did not know them to be incorrect, then they should not find for the defendant under that plea, neither should they find for the defendant under that plea if the plaintiff did make such fraudulent representations, if it appears from the evidence that the defendant, after finding out that the representations were false, held on to the cattle, and used or controlled them.

That in order for the defendant to sustain his plea of total failure of consideration, it is necessary for him to have shown that there was nothing valuable given by the plaintiff for the said note.

That if they find from the evidence, that the note sued on was a part of the sum of five thousand dollars, which the defendant was to give the plaintiff for cattle, in number sufficient, at the customary price of stock cattle at the time the cattle were sold, to amount to five thousand dollars, and they are satisfied from the evidence that there was not the number of cattle to amount to five thousand dollars at said rate, then they should deduct from the note the value of the number of cattle at said rate, as it has been proved to them the cattle were short of the number sold.

If neither of the defendant's pleas have been proved, they

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should give the plaintiff a verdict for the full amount of the note sued on, with interest from the time it became due.

The jury found a verdict for the plaintiff, and assessed the damages at (\$758.91,) seven hundred and fifty-eight dollars and ninety-one cents.

Motion was made for a new trial, which was denied, and judgment entered for plaintiff—from which judgment appeal is taken to this court.

The errors assigned are:

1st. The court erred by overruling the appellant's motion for a continuance.

2nd. The court erred in allowing the promissory note to be given in evidence to support the declaration.

3rd. The court erred by ruling out the following question asked Joseph Howell, viz: "did you or did you not understand from the parties, at the time they called to have a bill of sale written, of what cattle they intended to convey by the bill of sale?"

4th. The court erred by ruling out the following question propounded by appellant to William Durrance, viz "state whether or not plaintiff bought any of these cattle back from Sloan, after Harrell had sold them to Sloan, viz: these cattle you say defendant claimed for other persons."

5th. The court erred in ruling out a part of Wm. S. Spencer's testimony, and in not permitting said Spencer to answer questions.

6th. The court erred in not allowing the tax book to be given in evidence for the defendant.

7th. The court erred by ruling out the following question propounded to John C. Oats, viz: "what was the stallion horse Harrell got from Green in the cattle trade worth?"

8th. The court erred by ruling out the following question propounded to John C. Oats, after the said Oats was allowed to state, that Harrell traded the horse he got from Mr.

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Green to Mr. English, viz: "for what amount did Harrell trade the horse to English?"

9th. The court erred by ruling out the following question propounded to William S. Spencer, viz: "state whether or not plaintiff paid any taxes for Lucy Ann Durrance for the year 1858;" also the court erred by ruling out the following question propounded to the said Spencer, viz: "state whether or not any person paid taxes for Lucy Ann Durrance, for cattle, for the year 1858?"

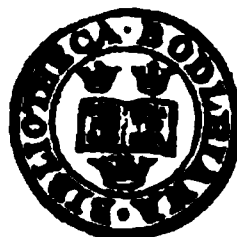
10th. The court erred by ruling out the following question propounded to Jesse Durrance, viz: "how many horses, asses, mules, sheep, swine and other stock, had plaintiff, except horned cattle, in 1858?" and the court erred by ruling out the following question propounded to the witness, viz: "state whether or not plaintiff purchased any of the stock that he had sold defendant back from Sloan?"

11th. The court erred by not granting a new trial to the appellant, defendant in the court below, upon the ground and reasons assigned by him, the appellant, defendant in the court below, and the court erred in its several instructions to the jury.

The act of 7th January, A. D. 1853, provides that when the Circuit Court "*shall refuse to allow and grant a motion for the continuance of the cause, (such refusal) shall and may be assigned for matter and cause of error, upon any writ of error sued out or appeal taken to the Supreme Court.*"

By the provisions of this act, this court is required to revise the order refusing continuance, and to do this, we are to look to the affidavit in support of the motion for continuance, and see whether the court below erred in its refusal.

The affidavit sets forth that Thomas Underhill is a material witness, &c., but in stating what he expects to prove by this witness, he does not state that he cannot prove the



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same matters by any other witness; nor that he cannot safely proceed to trial without his evidence; nor that he expects to procure said testimony at the next term. Motions for continuance are so often resorted to, not for the purpose of substantial justice, but for delay only, or because due and proper diligence has not been exercised in procuring testimony, that our courts should require that all the requisite grounds within the general rule, and important qualifications to this rule, be embraced in the affidavit in support of the motion."

The general rule, in a civil suit, is well established to be that where a party applies for a continuance for the term, on the ground of the absence of a witness, it must be shown by affidavit that the witness has been duly served with a subpoena, or a satisfactory reason assigned for the omission; that he is absent without the consent of the party, directly or indirectly given; that he resides in the county where the suit is pending, or if out of the county, good cause must be shown for not taking his deposition; that the testimony is material; that the applicant expects to procure said testimony at the next term; that the application is not made for delay only; that he cannot safely proceed to trial without the evidence of said witness, and the party must further state the facts expected to be proved by said witness.

If we try this affidavit by this rule, it will be seen that it is defective. We are therefore of the opinion, the court did not err in refusing the continuance as respects the application on the ground of the absence of this witness. The affidavit in support of the continuance as respects the other witness, Jesse Durrance, although not fully within the above rule, as it states, he was duly subpoenaed, &c., and that he does not know of any other witness by whom he can prove the facts stated, and that attachment has issued, was sufficient to continue the case from day to day during the term.

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No such motion as the latter, however, seems to have been made, and as we see in the record of evidence that this last mentioned witness was sworn on the trial, we presume no such motion was necessary. The opinion of the court is that the court below committed no error in refusing the continuance.

The next error assigned is, that the court, under the pleadings, erred in permitting the promissory note to be read in evidence. The expression in the promissory note is "*with interest from day.*" It is contended by the counsel for the appellant, that the declaration should have laid this portion of the note with a videlicet, averring what was the meaning of the parties to the note in the use of the word "day." That the legal import of the word "day" is to give interest from the day the note fell due, and not from date as alleged in declaration. The averment in the declaration is "with interest from date."

It will be observed that it is not attempted to state the very words of the note in the declaration. The plaintiff has set forth what he considers the substance and legal effect of the note in this respect. If the pleader has not mistaken the legal effect of the instrument, it will be considered sufficient. The rule in this respect is, that where the party professes to give the legal effect and operation of the instrument declared on, and he does not mistake the legal effect, there is no variance. 1 Chitty on Pleadings, 306.

This brings the court to consider whether the legal effect of said promissory note was correctly set forth in the declaration, wherein it is averred as calling for "interest from date."

Were we to treat the words "from day" as mere surplusage, the legal effect of the promissory note would be that it carries with it interest from date. Those words being re-

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tained, in our opinion, do not alter effect of the instrument. The promisor we think contracted to pay the said amount with interest from date. The legal effect being thus, there was no variance between the declaration and the note, and *allegata* and *probata*, according to the said rule of pleading, corresponded. The opinion of the court is that there was no error in the court's admitting the said promissory note in evidence.

The next error assigned is that the court erred by ruling out the following question asked Joseph Howell, viz: "did you or did you not understand from the parties at the time they called to have a bill of sale written, of what cattle they intended to convey by the bill of sale?"

Upon the inspection of the bill of exceptions, it appears that immediately preceding this question, the said witness had testified, that the parties came to him, and he "*drew the writing between them.*" He was asked as to the contents of an instrument in writing, and the question leads to a variance by parol evidence of a written contract; it asks of witness, "what cattle they *intended to convey*" by the bill of sale. The record shows that this bill of sale in writing reads as follows:

"STATE OF FLORIDA,)
Hillsborough County,) Know all men by these pres-
ents, that for and in considera-
tion of the sum of five thousand dollars to me in hand paid
by James M. Harrell, I have this day bargained, sold and
delivered to the said James M. Harrell, a certain stock of
cattle, marked as follows, to-wit: Upper bit in one ear,
swallow fork, poplar leaf in the other; some marked crop
in one ear, swallow fork in the other; some marked under
slope in each ear; some marked crop and under bit in one
ear swallow fork and under bit in the other; some marked
swallow fork and under bit in one ear, crop and under cross
nick in the other—the said cattle *all branded* with D. Some

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have S., K. and T. and D., for him, the said Harrell; *to have and to hold* the said stock of cattle to his own use and benefit; and I, the said Francis M. Durrance, do *sell him my entire stock and claim.*

In witness whereof I have hereunto set my hand and seal, this 13th November, 1858.”

The question, in the first place, was irrelevant to the issues, which were as we have seen. 1st, Fraudulent representations as to number and value, 2d. Partial failure of consideration as to value. 3d. Total failure of consideration. 4th. Want of consideration. 5th. Payment. Secondly, the question was to elicit the *intention* of parties previous to a written instrument, by evidence of a *previous* conversation, that is to say a conversation previous to the signing or execution of said bill of sale. The rule of law briefly expressed is, that “parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument.” All oral testimony of a previous colloquium between the parties, or of conversation or declarations at the time when it was completed or afterwards, is rejected, because it would tend, in many instances, to substitute a new and different contract for the one which was actually agreed upon. 2 Phil. Ev., 350; Boorman vs. Johnson, 12 Wendell, 573.

Parol evidence is sometimes admissible where the language of the instrument is applicable to several persons, to several species of goods, &c., or the terms be vague and general, &c. In all these cases and the like, parol evidence is admissible of *any extrinsic circumstance* tending to show what person or persons, or what things were intended by the party, or to ascertain his meaning in other respects. The case at bar is not one within this exception of infringement. We see, upon looking at the bill of sale, that it is therein expressly stated what are the *marks and brands* of the cattle intended to be transferred. There is no necessity for parol

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evidence to show what cattle was intended; their meaning is made plain by the designation of the marks and brands. On the part of the appellant, however, it is contended, that under the sweeping expression, "*do sell him my entire stock and claim,*" the appellee intended to include a certain other stock known as the Lucy Ann stock, and marked swallow fork and half fleur de lis in one ear, crop and under bit in the other, two dewlaps and branded oZ.

As it will be observed, the pleadings present no issue involving an enquiry as to the Lucy Ann stock; they present the issue of misrepresentation, fraud and want and failure of consideration and payment. The question proposed to the witness was to ask what was *intended* to be transferred.

In the bill of sale, as we have already seen, the parties expressed the marks and brands of the cattle. The maxim *expressio unius est exclusio alterius*, (the express mention of one thing implies the exclusion of another,) is peculiarly applicable here. The presumption is, that having expressed the marks and brands of some, they have expressed all which they intended. We are of opinion the court below did not err by ruling out the question.

The view which we have taken of the issues joined in this cause, and the construction given to the bill of sale, disposes of the 4th, 5th, 6th, 7th, 8th, 9th and 10th errors assigned. We think the questions proposed were irrelevant, and therefore the court did not err in ruling them out.

The 11th error assigned is that the court erred in its instructions to the jury, and in not granting a new trial. The evidence that this promissory note was given for this stock of cattle, is very slight and circumstantial; but admitting it established, we are unable to find any evidence in the bill of exceptions going to show that the appellant made any such fraudulent representations as are charged in the pleas, while there is evidence that the appellant realized over five thousand

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dollars from the sale of the cattle. The pleas are none of them sustained, and we see no error in the instructions of the court. It is contended that excessive damages were given by the jury, in that they did not allow the endorsement upon the note as a credit. In reply to this the appellee contends that the endorsement of the note was not in evidence. The bill of exceptions expressly states that the note and endorsement were put in evidence, and that the same was put in evidence by the plaintiff. The plaintiff in the court below having read to the jury a promissory note with a credit endorsed thereon, it is to be taken as an admission of the plaintiff that the credit should be allowed.

Upon a calculation of the amount due upon the promissory note at the time the verdict was rendered, we ascertain that there was then due the sum of \$716 26, consequently the verdict of the jury was for \$42 67 too much, and to that extent the damages assessed were excessive. The important inquiry at this point is what was the proper course of the court below, on discovering that excessive damages had been assessed—should new trial have been granted, or reduction of the verdict ordered?

In the case of Jansen vs. Ball, 6 Cowan, 631, the court say: "It seems to me this evidence did not authorize a verdict for a greater amount; as the damages are susceptible of calculation with considerable accuracy, I am not inclined to subject the parties to the expense of a new trial, if the plaintiff consent to remit a portion of the damages." See also Lane vs. Mullins, 2 Adolphus & Ellis, N. S., 254.

The court below ought to have pursued this course or granted a new trial. The opinion of the court is that there was error in not granting the new trial for this cause, or in not ordering a new trial unless the plaintiff shall within a number of days to be named remit \$42 67, parcel of the damages recovered. The judgment in the court below is *reversed*,

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and this cause remanded to the Circuit Court in and for Hillsborough county, with instructions to said court to grant a new trial, with costs to abide the event of the suit, unless the appellee shall, at the now next term of said court, remit \$42 67, parcel of the damages recovered, and in case he does remit to enter judgment accordingly, and it is further ordered that the appellee do pay the costs which have accrued in this court.

**EZEKIEL WATSON, APPELLANT, VS. JEREMIAH SAVELL, AP-
PELLEE.**

Where the record fails to show that a final judgment had been entered in the court below, the appeal will be dismissed.

This case was decided at Tallahassee.

DUPONT, C. J., delivered the opinion of the court.

This was an action on the case brought in the Circuit Court of Santa Rosa county by the appellee against the appellant, to recover damages for the failure of a warranty on the sale of a negro slave. The record shows that the cause was submitted to a jury upon the pleadings and evidence, and that a verdict was rendered for the plaintiff below for one hundred and fifty dollars; but it does not show that any judgment was ever entered up on the verdict. At the last term of this court a certiorari was granted to the appellant, upon motion suggesting a diminution of the record, to bring up the judgment, and the case was finally continued to the present term. Upon the calling of the case in its regular order at this term, a motion was again made for a further continuance, upon the ground that there had been no return

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of the writ of certiorari, which had been issued upon the motion made at the last term. The court refused to grant a further delay of the cause, and thereupon, it was submitted to the court upon the record, and without argument from either side.

It being admitted by the application of the appellant that the record contains no evidence of a final judgment having been rendered in the cause, and this court having no jurisdiction of a case *at law* until after final judgment, we are constrained to dismiss the appeal with costs. Dawkins vs. Carroll, 5 Fla. Repts., 407; McKinnon vs. McCollum, 6 Fla. R., 376.

We embrace this occasion to remark upon a matter of practice which does not seem to be fully understood by some of the members of the bar. We allude to applications on the part of *appellants* for writs of certiorari to bring up portions of the record from the court below, which may have been omitted through accident or negligence. The writ of certiorari, however appropriate when invoked by the appellee, presents an anomaly in the case of the appellant. It is not only his right to *demand* of the clerk below a full record of his case, but it is his duty to see that there are no omissions or imperfections in it before he causes it to be filed in the Supreme Court. If through inadvertence an omission should be discovered after the record has been filed, he may, on his own motion, obtain a transcript of the omitted portion, properly certified, and apply to the court to have it incorporated as a part of the record before the argument is opened. If, however, there be not sufficient time between the discovery of the omission and the calling of the cause in its order on the docket, his only remedy will be to move for time, which will or will not be granted at the discretion of the court.

In the case at bar the appellant was indulged by a contin-

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uance for the term, and he cannot reasonably complain that he is denied further indulgence. The appellee has rights which address themselves with equal force to our sense of justice.

It is ordered that the appeal taken in this case be dismissed with costs.

**THE ALABAMA & FLORIDA RAILROAD COMPANY, APPELLANT
VS. L. W. ROWLEY, APPELLEE.**

1. It is an admitted rule of pleading that where the matter alleged in the pleading is to be considered as lying more properly in the knowledge of the plaintiff than of the defendant, in that case the declaration ought to state that the defendant had notice of the same.
2. And where a special averment of notice is necessary, the averment must be proved.
3. In an action by a Railroad Company against one of its Stockholders to recover the amount of certain assessments or calls upon his shares of stock, notice of such assessments or calls must be averred in the declaration and proved at the trial.
4. A notice published in a newspaper, calling upon the stockholders generally to pay up such calls, is not sufficient proof of notice, unless it be so provided by the charter or by-laws of the Company.

This case was heard at Marianna and decided at Tallahassee.

A full statement of the case is contained in the opinion of the Court.

Jordan & Blount for appellant.

George G. McWhorter for appellee.

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DUPONT, C. J., delivered the opinion of the Court.

This was an action of assumpsit instituted in the Circuit Court of Santa Rosa county, by the appellant against the appellee, to recover certain assessments or calls alleged to be due on the shares of the capital stock of the said company, held by the said appellee. Besides the common indebitatus count, the declaration contains a special count, setting forth that the defendant had subscribed for two shares of the capital stock of said company, at one hundred dollars per share, and that in consideration thereof, he had for the one share made and executed a promise or agreement in writing, by which he promised to pay one hundred dollars in such instalments as might be called for under the provisions of the charter of the said company; and for the other share, he made and executed another promise or agreement in writing, by which he promised to pay the further sum of one hundred dollars when called for on instalments, on condition that a contract is first made for the construction of the road to the Florida line. The declaration further alleges that a contract for the construction of the road had been made and the several instalments sued for had been called in prior to the institution of the suit, with an averment that the defendant had due notice, both of the contract for the construction of the road and of the calls for the instalments.

There was a demurrer to the declaration which was sustained and the declaration ordered to be amended. The defendant filed five pleas, in substance as follows, and each concluding to the country, viz:

1st. The general issue of non-assumpsit.

2d and 3d. That no contract had been made for the construction of the road to the Florida line.

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4th. That the directors of the company had not, at any time prior to the institution of the suit, made any calls, or required the payments of any instalments upon the shares held in the capital stock of the company.

5th. That the directors of the company did not, prior to the institution of the suit, give him, the defendant, any notice of the alleged calls for instalments as is set forth in the declaration.

The record shows that after several continuances had been had, a non-suit was taken by the plaintiff, which, on the same day, was set aside and the following order entered, viz:

“In this case, the judgment of non-suit heretofore rendered in this suit is set aside, and the cause reinstated, a jury waived, and the case submitted to the court upon an agreed statement of facts. Thereupon, all and singular, the premises being seen, and by the court here fully understood, and mature deliberation being thereupon had, it is considered by the court that the said plaintiff take nothing by his said declaration, and the said defendant do go thereof without day, &c; and it is further considered by the court here, that the said defendant do recover against the said plaintiff his costs and charges by him laid out about his defence in this behalf, and that the said defendant have execution thereof, &c.”

From this judgment the plaintiff took his appeal, and now brings it here for adjudication.

For a full understanding of the case, it is deemed necessary to set out the bill of exceptions *in haec verba*. It is as follows, viz:

“Be it remembered that upon the trial of this cause, the plaintiff introduced in evidence to the court the following advertisement published in the Pensacola Gazette, a newspaper printed in the city of Pensacola, Florida, in reference

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to the first call for instalments mentioned in said declaration, namely :

RAILROAD NOTICE.

OFFICE OF THE ALABAMA AND FLA. R. R. COM'Y., {
Pensacola, April 8th, 1856. }

The stockholders of the Alabama and Florida Railroad Company of Florida are hereby notified that three instalments of five per cent. each upon the capital stock, are hereby required to be paid into the hands of the Treasurer; the first on or before the 10th day of May; the second, on or before the 10th day of June; the third, on or before the 10th day of July, 1856.

O. M. AVERY, *President pro tem.*

Attest—HENRY F. INGRAHAM, Secretary.

✍ The undersigned will be at his office at all hours of the day, corner of Palafox and Intendentia streets.

(Signed,)

B. D. WRIGHT,
Treasurer of the Ala. & Fla. R. R. Co.

April 12th, 1856.

And subsequent advertisements in precisely the same form, published in the same newspaper, in reference to all the subsequent calls for instalments in said declaration mentioned, as said calls were respectively made. To which evidence the defendant objected, and no other evidence of notice of said calls for instalments was submitted. Thereupon the court ruled that said advertisements were not *per se*. sufficient notice to said defendant of said calls. To which ruling of the court the said plaintiff excepted and tendered to this court this his bill of exception, with a request that the court would sign and seal the same, which was accordingly done.

(Signed,)

J. J. FINLEY, Judge, [L. s.]

The assignment of errors in this court is as follows, viz:
“That the court below erred in ruling that the testimony

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offered by the plaintiff in the court below was not sufficient notice to the defendant of the call upon him to pay the instalments due upon his stock, viz: a notice published in a newspaper in the city of Pensacola, calling upon the stockholders of the said Alabama and Florida Railroad to come forward and pay the instalments due on their subscriptions of stock.

(Signed,)

JORDAN & BLOUNT,
for Appellants."

This statement embraces the full history of the proceedings in the Circuit Court, so far as the same can be gathered from the record before us. It will be perceived "that the agreed statement of facts" mentioned in the order submitting the cause to the decision of the court, is not incorporated in this order, nor is there any other fact noted in the bill of exceptions except the newspaper advertisement notifying the stockholders to respond to certain assessments or calls, which had been made by the board of directors. In this state of the record, the only conclusion that can be arrived at is, that the case was submitted to the court upon the isolated question of *notice*. With this view of the case, we will proceed to consider *first*, the necessity for notice and secondly, the sufficiency of the notice alleged to have been given.

It is an admitted rule of pleading, "that when the matter alleged in the pleading is to be considered as lying more properly in the knowledge of the plaintiff than of the defendant, then the declaration ought to state that the defendant had notice thereof." 1 Chitty on Pleading, 320.

It is equally true that whenever it becomes necessary to make a special averment of notice in the declaration, that averment must be supported by competent proof. With this rule before us, the question occurs, was it necessary in this case that the defendant should have any notice of the

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several calls for the payment of instalments of stock, which are alleged to have been made by the board of directors?

In our investigation of this point, the court is thrown upon its own resources, no authorities having been cited by the counsel of either side. The only case directly on the point that we have had any reference to, is that of *Ross vs. Lafayette and Ind. Railway*, 6 Porter (Ind.) R. 297. The report of this case is not within our reach, but it is referred to in *Redfield on Railways*. His reference is as follows: "But where the subscription contains a provision that payment shall be made at such times and places as should thereafter be directed by the directors, and shall be applied to the construction of the road, it was held that the subscription did not become payable until the directors, at a regular meeting, had fixed the time and place of payment. But it is further held in this case *that it is not necessary to give notice to the subscribers of the time and place of payment.*" *Redfield on Railways*, 82.

By what process of reasoning the court were enabled to arrive at the position announced in that case, we are at a loss to determine, and it is to be regretted that we have not access to the report. For aught that we know, there may have been something in the charter of incorporation which warranted the position assumed. Be that as it may, we are satisfied that upon general principles, and in the absence of any provision in the charter, warranting the position, it is incorrect, and in this we are sustained by the authority of Mr. Redfield. Commenting upon this case, and referring particularly to the point under consideration, he says: "This point in the decision seems not altogether in accordance with the usual practice in such cases, or the general course of decision in regard to calls, which, upon general principles, must be notified to subscribers before an action can be maintained."—*Ib.*

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The “general principle” alluded to in the foregoing citation we take to be the one with which we set out in this argument, viz: “that when the matter alleged in the pleading is to be considered as lying more properly in the knowledge of the plaintiff than of the defendant, then the declaration ought to state that the defendant had notice thereof.” Now in whose knowledge will the *fact* of the making of calls or assessments upon the shares held in the capital stock be considered as more properly lying—in that of an individual private stockholder, or in that of the corporation, which acts and speaks by and through its authorized and acknowledged agent, the Board of Directors? Indeed, if we are not greatly in error a private stockholder of an incorporated company has no right to have access to the minutes of the proceedings of the directors, unless that right is expressly given by the charter, and consequently and of necessity he must remain ignorant of their action until they choose to make that action known. With reference to the matter of notice as affecting a private stockholder, there is a very marked and obvious difference between the action of a general meeting of the stockholders and that of a Board of Directors. All the proceedings of the former are *presumed to be known* to each individual stockholder, it being not only his right, but his duty to be present, for the purpose of participating in such proceedings. But not so with reference to the proceedings had at a meeting of the Board of Directors. These proceedings are usually private, and the *presumption of notice* will not attach to a private stockholder sooner than it will to an entire stranger. It may be suggested that the act of subscribing for the two shares of stock created a debt against the defendant, and that he was bound to take notice of the time of payment, the same as the giving of a note payable on demand, which may be sued on without any special demand of payment, the institution of the suit being

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held to constitute a sufficient demand. There is this difference between the two cases. The giving of a promissory note payable on demand is held to create a *debt in presenti*, absolute and unconditional, which the maker of the note may pay off at any time before a demand is made, whereas the act of subscribing to the stock of the company does not create a present indebtedness, but the obligation to pay, by the very terms of the contract, is contingent, and made to depend upon a *condition precedent*, to-wit: the calls to be made by the directors. If this be so, the performance of the condition precedent being without the exclusive control of the company, it follows, upon the general principle before announced, that to raise the obligation to pay, there must be an actual demand, or what may be equivalent to the same, under the provisions of the charter. We conclude, therefore, that in this case no right of action accrued against the defendant for the recovery of the several calls mentioned in the declaration, until after he should have received proper notice that they have been made in the manner prescribed in the charter. This brings us to the consideration of the second point, viz: the *sufficiency* of the notice which was attempted to be proved at the trial.

It will be remembered that the only effort to prove notice to the defendant that the calls had been made by the directors, was the exhibition of the advertisement in the Pensacola Gazette, calling upon the stockholders generally to pay the instalments due on their shares of stock. It is quite usual, we believe, in charters of incorporation to provide for giving of notice by public advertisement, and where such mode is prescribed, either in the charter or by-laws of the company; we can perceive no objection to the validity and sufficiency of such notice. But in the absence of such provision we think it might be attended with irreparable injury to innocent parties to establish as legal so loose a mode

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of proceeding. We have examined the charter of this company and have been unable to discover any provision on the subject.

If the publication of the notice in the Pensacola Gazette should be held to be sufficient notice, there is no reason why it may not have been published in one of the papers printed at the capital of the State. That the office of the company was located in Pensacola is no answer, for it is quite apparent that as to this defendant he was not a citizen of Pensacola, but a resident in another county, to-wit: the county of Santa Rosa. Upon mature consideration, we are of opinion that the proof of notice was not sufficient to fix the liability of the defendant.

It is therefore ordered that the judgment of the court below be affirmed with costs.

JAMES DUGGAN, APPELLANT, VS. THE STATE OF FLORIDA.

1. The Supreme Court will always reverse a judgment in a criminal case where it shall appear that the judge charged the jury upon the case but did not reduce his charge to writing, and file it in the case, according to the 8th section of the Act of January 4, 1848.
2. The record stated that the prisoner was led into court by the Sheriff, "whereupon came a jury, &c., who being duly chosen, tried and sworn, after hearing the evidence and argument of counsel, *and under charge of the court, retired* to consult of their verdict," &c.: Held that this language does not furnish evidence that the judge charged the jury within the meaning of the above act.
3. Remarks by the Judge to the jury touching their behavior on retiring to consult of their verdict, as that they shall not speak to any one or suffer any one to speak to them do not constitute a charge within the meaning of said act.

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4. The Circuit Judge must be presumed to have done his duty in the absence of proof to the contrary.

Appeal from Escambia Circuit Court.

This case was decided at Marianna.

The case is fully stated in the opinion of the court.

C. W. Jones for appellant.

The State not represented.

WALKER, J., delivered the opinion of the Court.

At the Fall Term 1860, of Escambia Circuit Court, the plaintiff in error was tried, convicted and sentenced for the murder of William Wallace.

The assignment of error in this court is, that "it does not appear from the record proceedings of this case in the court below, that the Judge filed the charge which he delivered to the jury."

This assignment would unquestionably be sufficient ground for reversal if supported by the record. The 8th section of "An Act to provide writs of error in criminal cases," approved January 4, 1848, read as follows:

"Sec. 8. *Be it further enacted*, That charges made by Judges to juries in all criminal cases, shall be reduced to writing and filed in the case, and shall be exclusively on points of law; and that any violation of this section shall be deemed and construed to be error from which a writ of error may be prayed as of right."

The language of this act is too plain for comment, and in every criminal case where it shall appear that a Judge has charged a jury either upon the law or facts, without reducing his charge to writing and filing it in the case, we should hold it to be error.

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But the difficulty in the way of reversal in this case is, that it does not appear that the Judge delivered any charge to the jury either upon the law or facts, written or unwritten. The only part of the record which speaks of a charge is, that part which says the prisoner was led into court by the Sheriff, and then proceeds thus: "Whereupon came a jury, &c., who being duly chosen, tried and sworn, after hearing the evidence and argument of counsel and under the charge of the court, retired to consult of their verdict," &c. It is contended that the words "*and under the charge of the court, retired,*" &c., furnish evidence that the court delivered a charge to them upon the law or facts of the case which ought, under the statute, to have been reduced to writing and filed. But after much reflection we have been unable to reach that conclusion. The record does not say that the jury after hearing the evidence and argument of counsel and the charge of the court, retired, &c.; but it says that after hearing the evidence and argument of counsel and *under* the charge of the court, they retired, &c. Even though the Judge had not addressed a word to them, yet this language of the record would be true and proper, because the jury always retires under the charge, protection and care of the court. This language is but a formula which may, and perhaps should be used in all cases whether the Judge has charged the jury on the law or facts or not. It is usual for the Judge to instruct the jury on their withdrawal touching their behavior in retirement as that they shall not speak to any one or suffer any one to speak to them, &c., but we are clear that such remarks do not constitute a "charge" within the meaning of the statute above referred to.

If the Judge did charge the jury within the meaning of that statute, the plaintiff in error, if he desired to take advantage of it, should have moved the court to amend the record so as to set out that fact distinctly, or else to have ob-

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tained from the Judge a statement to that effect in the nature of a bill of exceptions, and in case the Judge refused to sign said statement, then it was the right of the plaintiff in error under the first section of said act, to have said statement signed by any three persons in the presence of the Judge.

If the Judge did charge the jury, it was his duty to file his charge in the case. We must presume he did his duty in the absence of proof to the contrary. Therefore, let this case be remanded to the Circuit Court in and for the county of Escambia, and the Judge holding said court be directed to cause the said James Duggan to be brought before him in open court, and nothing appearing why sentence of death should not again be passed upon him, that said Judge in open court do re-sentence the said James Duggan to be executed at such time and place as said court may deem fit and proper, and that said court do cause said sentence to be carried into execution. *Per curiam.*

THOMAS PITTS, APPELLANT, vs. AUGUSTUS W. JONES, APPELLEE.

1. Although the drawer has no funds in the hands of the drawee, yet if he has a right to expect to have funds in the hands of the drawee to meet the bill, or if he has a right to expect the bill to be accepted by the drawee in consequence of an agreement or arrangement with him, or if upon taking up the bill he would be entitled to sue the drawee or any other party to the bill, then in every such case he is entitled to strict notice of the dishonor.
2. An agent is entitled to notice of the dishonor of his bill on his principal, though he had no funds in the principal's hands, and the payee had no knowledge that he was acting as agent.

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3. The payee of every draft or bill takes it upon the implied condition that he is not to hold the drawer liable without giving him notice of the draft or bill he dishonored, and if such notice be not given, it is at the peril of the payee.

Appeal from Santa Rosa Circuit Court.

A statement of the case is contained in the opinion of the court.

G. G. McWhorter for appellant.

Landrum & Jones for appellee.

WALKER, J., delivered the opinion of the court.

This was an action of assumpsit to recover the amount of a bill of exchange of which the following is a copy:

“Messrs. E. A. Pearce & Son: Pay at sight to A. W. Jones or order, one hundred and sixty-eight 32-100 dollars, value received Dec. 19, 1857.

THOMAS J. PITTS,”

The declaration contains a count on this bill in the usual form, alleging presentment for acceptance, refusal to accept and notice. Also a second count for goods, wares, merchandize, &c.

The pleas are:

1st. That E. A. Pearce & Son did accept said bill when presented.

2d. That said bill was never presented for acceptance.

3d. That on the refusal of E. A. Pearce to accept, plaintiff did not give notice thereof to defendant.

4th. That said bill was never presented for payment.

5th. That plaintiff gave no notice to defendant of non-payment.

6th. That defendant purchased the goods, &c., mentioned in the 2d count as agent of E. A. Pearce & Son, of which plaintiff had notice, &c.

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The bill of exceptions shows that there was no purchase of any goods, wares and merchandize, except certain saw logs for which the bill of exchange declared on was given, and that said purchase was made by defendant as agent of E. A. Pearce & Son, the drawees; that he was authorized to draw upon them and they refused to accept on the allegation that the payee of the draft was indebted to them.

Such being the pleadings and evidence, counsel for defendant moved the court to instruct the jury:

“1st. That if they found from the evidence that said bill was given as the purchase price for pine saw logs, and that said Pitts was acting as agent for E. A. Pearce & Son in said purchase, and drew said bill on E. A. Pearce & Son, and they refused to accept said bill on presentation to them; that said Pitts was entitled to notice of the non-acceptance by said Pearce & Son of said bill.

“2d. That if the jury found from the evidence that said bill was drawn and given by said Pitts to said Jones as the purchase price for pine saw logs, and that said Pitts was acting as agent for E. A. Pearce & Son in said purchase and drew said bill as their agent, and said Pearce & Son refused to pay said bill on presentation to them for payment, that said Pitts was entitled to notice of the non-payment of said bill by E. A. Pearce & Son.”

The court refused to give either of these charges, and defendant excepted. Verdict and judgment having been rendered against defendant he appealed to this court, and now assigns that the Circuit Judge erred in refusing the instructions as prayed for.

It is contended by counsel for appellant that the fact that the drawer had no funds in the hands of the drawees, (which fact is conclusively shown in the bill of exceptions,) at the time of drawing, is sufficient excuse for want of notice. On the other hand it is contended that the fact that appellant

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acted as agent of drawees, and was authorized to draw upon them, entitled him to notice, even though payee had no knowledge of the agency.

Let us examine the authorities and see which of these positions is correct.

Mr. Greenleaf, in the second volume of his work on Evidence, 195, says:

“If no notice of dishonor has been given, or no presentment or protest has been made, the plaintiff may excuse his neglect by proof of facts showing that presentment or notice was not necessary. Thus, when the defendant was drawer of the bill, the want of presentment was excused by proving that he had no effects in the hands of the drawee, *and no reasonable expectation to expect that the bill would be honored from the time it was drawn, till it became due.*”

Mr. Justice Story, in his work on Bills, 311, lays down the rule thus:

“In the next place, if the drawer has *no right whatsoever* to draw the bill, or no reasonable ground to expect the bill to be accepted, he is not deemed entitled to notice of the dishonor thereof, for it was his own fault to draw the same; and correctly speaking, he cannot be said to have suffered any loss by the want of notice. Thus, for example, ordinarily if the drawer draw the bill without having funds in the hands of the drawee, or *expectation* of funds, or arrangement or agreement on the part of the drawee to accept the bill, he will not be entitled to notice, and not be discharged by the want thereof. But although the drawer has no funds in the hands of the drawee, yet if he has a right to expect to have funds in the hands of the drawee to meet the bill, or if he has a right to expect the bill to be accepted by the drawee in consequence of an agreement or arrangement with him, or if upon taking up the bill he would be entitled to sue the drawee or any other party on the bill, as if he be an accom-

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modation drawer for the drawee or payee, or any subsequent endorser, then, in every such case he is entitled to strict notice of the dishonor. The distinction between the cases may seem at first view to be somewhat artificial and not altogether satisfactory. But it is founded on this consideration, that in the latter case the drawer draws the bill in *good faith* and has *reasonable grounds* to believe that it will be honored, and therefore he may well insist upon a punctual discharge of duty on the part of the holder, whereas in the former cases it is his own fraud or folly to draw a bill which he has no reasonable ground to expect to be honored, and therefore he may well impute the injury, if any, to himself, to his own laches and to his having misled the holder."

Mr. Chitty in his treatise on Bills (8th edition, 356) says:

"But if the drawer of a bill, *from the time of making it to the time when it was due and presented for acceptance*, had no effects in the hands of the drawer or acceptor, and had *no right on any other ground* to expect that the bill would be accepted, and the bill was drawn for the accommodation of such drawer, he is *prima facie* not entitled to notice of the dishonor;" and again at page 359: "Nor is actual value in the hands of the drawee at the time of drawing essentially necessary to entitle the drawer to notice of dishonor of the bill, for circumstances may exist which would give a drawer good ground to consider he had a right to draw a bill upon his correspondent."

In the case of Bickerdike vs. Bollman, 1 T. R., 405, it was held that notice was not necessary where the drawer has no effects in the hands of the drawee, Ashurst, Justice, remarking, "for it is a fraud in itself, and if that can be proved the notice may be dispensed with;" and Buller, Justice, remarking that "the law requires notice to be given for this reason, because it is presumed that the bill is drawn on account of drawees having effects of the drawer in his

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hands, and if the latter has notice that the bill is not accepted or not paid, he may withdraw them immediately, but if he has no effects in the other's hands, then he cannot be injured for want of notice." Chief J. Marshall in *French's Executrix vs. the Bank of Columbia*, 4 Cranch, 141, says that the true construction of the case of *Bickerdike vs. Bollman*, and those cases which followed it, is, "that a person having a *right to draw* in consequence of engagements between himself and the drawee, or in consequence of consignments made to the drawee, *or from any other cause*, ought to be considered as drawing upon funds in the hands of the drawee, and therefore not coming within the exception to the rule." Mr. Smith in his *Leading Cases*, vol. 2, 44, reviewing the case of *Bickerdike vs. Bollman*, cites a great number of authorities, and arrives at the conclusion that "the amount, therefore, of the principle of *Bickerdike vs. Bollman*, as defined by the American authorities, is, that demand and notice is not necessary where the drawing and delivering the bill is fraudulent." He further says, "The whole principle of exception, then, appears to be, that where the non-acceptance or non-payment of the bill is caused by the fraudulent act of the drawer or endorser, or, in other words, where the drawing or issuing of the bill, or the leaving it to be presented, is a fraud in any party, liable on the bill, such fraudulent party is not entitled to notice; and it is believed that there are no other exceptions to the general rule requiring demand and notice."

The cases cited upon this point by Greenleaf, Chitty, Story and Smith, are very numerous. It would consume much time and space unnecessarily to notice each of them separately. Upon the whole, we are satisfied we may safely adopt the rule as before quoted from Judge Story in his work on Bills, 311, as the true rule on this subject. That ruling is, that "although the drawer has no funds in the

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hands of the drawee, yet, if he has a right to expect to have funds in the hands of the drawee to meet the bill, or if *he has a right to expect* the bill to be accepted by the drawee *in consequence of any agreement* or arrangement with him, or if *upon taking up the bill he would be entitled to sue the drawee* or any other party on the bill," "then, in every such case he is entitled to strict notice of the dishonor."

Having adopted this as the correct ruling, we shall have little difficulty in applying it to the case before us. If we ask the question whether the drawer in this case did not have a right to expect the bill to be accepted and paid by the drawee in consequence of an arrangement or agreement with him, or if upon taking up the bill he would have been entitled to sue the drawee, we can have no hesitancy in answering affirmatively. The evidence shows he purchased the saw logs for which the draft was given only as the agent of E. A. Pearce & Son, and had in his own right no interest in the matter. His agency alone would have authorized him to draw upon E. A. Pearce & Son to pay for the logs purchased for them, and in addition to that, there is express evidence that he was authorized to draw upon them. If notice had been given him of the non-acceptance and he compelled to pay the draft, he, of course, would have had a right of action against Pearce & Son for the amount.

It is, indeed, difficult to conceive of any class of persons more strictly entitled to notice than those acting as agents. It is true they may have no funds in the hands of the drawees, their principals, but nevertheless they may suffer quite as much damage from want of notice as if they had.

Where an agent is engaged in purchasing saw logs, cotton, or other produce for his principals, and draws for it, he may be, and doubtless in many cases would be, utterly ruined but for his right to notice of the dishonor of his bill.

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Upon receiving notice of such dishonor, he will, of course, cease to purchase; but if he is entitled to no such notice and receives none, he will continue to purchase, perhaps to a very large amount, remitting the product to his principals and drawing upon them therefor, and find out only when too late that his principals have long since failed, and he bound to pay a large number of drafts for which he never received any consideration. And besides, it is the right of the agent to have notice so that he may at once call upon the principal and procure indemnity against the liability fixed upon him by the notice.

Nor is it essential to the right of the agent to notice that the payee of his bill shall have knowledge of his agency. The payee of every draft or bill takes it upon the implied condition that he is not to hold the drawer liable without giving him notice, and if the notice be not given, it is at the peril of the payee.

We are clear that the learned Judge of the Circuit Court erred in refusing the instructions asked for.

Let the judgment be reversed with costs. *Per curiam.*

**E. A. PEARCE & SON, APPELLANTS, vs. A. W. JORDAN,
APPELLEE.**

1. Where the pleadings are in such a defective condition as to make it manifest that the jury who tried the cause could not have had an intelligent apprehension of the issues to be tried, the judgment will be reversed, and the cause remanded for a new trial.
2. The Supreme Court will not consent to sit as an arbitrator between the parties to a cause brought up by appeal or writ of error.

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Appeal from Santa Rosa Circuit Court.

This case was argued at Marianna and decided at Tallahassee.

C. C. Yonge for appellants.

C. C. Henderson and *G. G. McWhorter* for appellee.

DUPONT, C. J., delivered the opinion of the court.

This is an appeal from a judgment rendered in the Circuit Court of Santa Rosa county, at the suit of the appellee against the appellants. The action was brought to recover the value of a lot of pine saw logs, alleged to have been sold and delivered by the plaintiff to the defendant. Besides the common counts, the declaration contained a special count on the contract for the cutting and delivery of the logs. To this declaration the defendant pleaded the general issue of non assumpsit, and a special plea setting forth the contract with an averment of *damages* for the non-performance of the same. There was also a plea of set-off and of payment of a *specified sum of money*, concluding with a verification. There was a demurrer to the second plea, and also a demurrer to the replication to the third plea. The record shows that at the time that the cause was submitted to the jury, both of these demurrers, remained undisposed of, and that no issue had been joined on the various pleas, with the exception of that of the general issue. It also appears that there were two trials of the case, both of which resulted in favor of the plaintiff. On the first trial, the verdict was for the sum of three hundred and twenty-eight dollars and eighty-eight cents. The verdict was set aside and a new trial awarded on motion of the defendant. The grounds of that motion were as follows, viz: "1st. That the verdict is contrary to evidence. 2d. That it is contrary to the weight

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of evidence. 3d. That it is contrary to law. 4th. That it is contrary to the charge of the court." On the second trial, a verdict was rendered for one thousand, one hundred and thirty-three dollars and forty-one cents. The defendant moved to set aside this second verdict, on the same grounds as those alleged against the first verdict, but the motion was denied and judgment was accordingly entered up. It is from that judgment that this appeal is taken.

The assignment of errors in this court is as follows:

"1st. That the court erred in refusing a new trial.

"2d. In admitting the testimony of witness Catur, so far as the same related to the admission of E. A. Pearce of the agency of T. M. Ellis.

"3d. In proceeding with the trial and rendering judgment on the verdict, when the several demurrers to pleas and replications were undisposed of."

The conclusion at which we have arrived upon a very careful examination of the whole record, renders it unnecessary that we should consider the first and second errors assigned; our attention therefore will be confined to the third and last. The error thus assigned is very fully sustained by the record. It is there made to appear that there was a demurrer to the second plea, and also a demurrer to the replication to the third plea. These two demurrers appear to have been standing open and undisposed of when the cause was submitted to the jury. Beside this, there was no issue joined on either of the three special pleas. Without undertaking to say how far the defendant may be considered as having waived the defences embraced in his special pleas, by consenting to go to trial before issue was properly joined, or the several demurrers were disposed of, it is very manifest that the state of the pleadings was well calculated to confuse the mind of the jury and to render it impossible that they should render an intelligent verdict.

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The marked and extraordinary discrepancy between the two verdicts, (especially when the grounds for setting aside the first verdict are considered,) affords ample proof of this, and we think that the cause of justice will be subserved by remanding the case for a new trial, when the pleadings can be properly made up and the issues be presented in an intelligible form.

In the case of *McKinnon vs. McCullom*, 6 Fla. R., 376, this court held that it was sufficient cause to reverse the judgment rendered in that case and remand the cause for a new trial, because it appeared that the trial was had while certain of the pleadings remained undisposed of. Whether the decision in that case is to be taken as the announcement of a rule of law of general application, or to be confined to the state of the pleadings as they were found to exist in that case, it is unnecessary to decide. We think, however, that it sustains the conclusion arrived at in this case.

By an agreement entered into between the counsel who argued the cause in this court, and of file, it was stipulated in substance, that should the court arrive at the conclusion that there was sufficient error to cause the judgment to be reversed, then they were requested to examine the evidence, and from it to determine the proper amount between the parties, and for which amount so to be found, a judgment was to be entered at the next term of the Circuit Court.

With a full appreciation of the motive which induced this agreement, and with every disposition to accommodate the parties in their laudable desire to end this controversy, we think it would be too great a departure from the line of our prescribed functions to comply with their request. The jurisdiction of the Supreme Court is "appellate only," and it is inadmissible for the Justices to sit as arbitrators between the parties to a cause. If it be desirable to dispense with a jury and to have the case investigated by the court, the

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parties will be afforded the opportunity (under the provisions of the statute,) when the case comes up on the new trial in the court below.

It is ordered that the judgment be *reversed*, the verdict set aside and a new trial granted, with leave to amend the pleadings in the court below. It is further ordered that each party shall pay his own costs accruing upon the taking and prosecuting of the appeal.

JOHN AMMONS, APPELLANT, VS. THE STATE OF FLORIDA.

1. Upon a change of venue in a criminal case, the transmission of the copy of proceedings, including the order for change of venue, accompanied with the original indictment and other necessary papers mentioned in the order (if any) of the court, *prima facie* satisfies the statute.
2. The making of the order changing the venue in such a case and adjourning the court without revoking it, *vested, eo instanti*, jurisdiction in the Circuit Court of the county to which the cause is forwarded. The jurisdiction cannot be in abeyance.
3. In all criminal cases, whether upon a change of venue or otherwise, the trial should be upon the original indictment, unless by some *express* act the court is authorized to use a copy thereof.
4. When the venue in a criminal case has been changed, the prisoner may raise the question of the sufficiency of the transcript from the court in which the indictment was found, and may require the production of all necessary papers not sent forward, and should not be forced to trial with them.
5. If a prisoner go to trial in such a case on an imperfect transcript, without objection, he waives all right to object in arrest of judgment.
6. Where in a criminal case there is conflicting evidence, and attempt made on the trial of the cause to impeach a witness, which failed, the jury giving credit to the testimony of the witness, this court will not review their action.
7. The common law of England in relation to crimes is adopted and declared

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to be in full force in this State, excepting only so far as the same relates to the modes and degrees of punishment.

8. The record being in *fiert* and under the control of the court during the entire term, its completion at any time before the final judgment relates back and heals previous informalities.

This case was argued at Marianna and decided at Tallahassee.

The following statement of the case was prepared by the Judge who delivered the opinion of the court:

John Ammons, the appellant, was indicted at the Fall Term, 1858, of the Circuit Court of Holmes county, for the murder of one Samuel McQuage. The record sets forth that on the 3d November, 1858, the Grand Jury of Holmes county came into court and presented the bill of indictment, a copy of which is given in the record, and upon inspection of the original indictment presented by prisoner's counsel in argument, it appears to have been filed by the clerk of said court on that day. Afterwards, on the application of the prisoner, a change of venue was granted by the court to Jackson county, the order for which reads as follows, viz: "It appearing to the court upon the affidavit of the prisoner that he fears he cannot have a fair and impartial trial in the county of Holmes, on account of the prejudice existing against him, it is ordered that the venue in this case be changed to the Circuit Court of the county of Jackson, to be begun and held at Marianna on the second Monday of the present month. It is further ordered that all the witnesses for both the prosecution and defence, be recognized to be and appear at said Circuit Court of Jackson county on Tuesday of the second week of the term thereof, to testify in said case, and not depart without leave of said court. It is further ordered that the clerk of this court do transmit to the clerk of the Circuit Court of Jackson county the indictment and all the original papers

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in this prosecution on file in his office, together with a copy of all the recognizances of the witnesses recognized to appear and testify in this case. And it is further ordered that the Sheriff of the county of Holmes do safely convey the prisoner to the jail of the said county of Jackson, and there deliver him to the Sheriff of the said county of Jackson, to be safely confined in said jail."

In pursuance with this order, the clerk of the Circuit Court of Holmes, sent forward to the clerk of said court in Jackson county a transcript as ordered and the original indictment. No copy of the indictment was included in the transcript of the record. At said term of the court in Jackson county, it appears by the record the prisoner was arraigned and plead not guilty, and upon his motion, supported by affidavit, the cause was continued.

At the July Term, 1859, the trial was continued on motion of prisoner.

Fall Term, 1859, the prisoner was put upon his trial and a verdict of guilty rendered. The prisoner moved for a new trial, which was granted.

At Spring Term, 1860, prisoner made motion to amend the record so as to show that the said verdict was set aside and new trial granted upon other grounds than those embodied by prisoner in his motion for new trial, which motion was refused by the court and excepted to. The cause was then called for second trial, and on hearing the indictment read, the prisoner pleaded *former conviction*, to which plea the State replied that the new trial was awarded the prisoner on his own motion, and the prisoner demurred to the replication, which demurrer was overruled, and the prisoner permitted to join issue upon the said replication; whereupon a jury was empanelled to try the issue thus joined, and returned as their verdict that said new trial was awarded the prisoner on his motion.

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The prisoner was then again arraigned, and plead not guilty to the indictment.

Whereupon, on the application of the prisoner and for good cause shown, the venue was changed to Calhoun county.

The order changing this venue reads as follows, viz:

“And whereupon, on the application of the prisoner, and for good cause shown by the affidavit, together with the testimony of Henry O. Bassett, the present Sheriff, James J. Rigby, Franklin Hart, George W. Bassett and Benjamin G. Alderman, the court doth order the venue to be changed to the Circuit Court for the county of Calhoun, that being the most convenient court where, in the opinion of the Judge of this court, the State of Florida and the prisoner can have a fair and impartial trial, and the said John Ammons is remanded to jail, there to remain till the removal to the Circuit Court of said county of Calhoun at its next term, to be held on Monday, the 14th day of the present month, (May).”

Subsequently the Sheriff of Jackson county was ordered by the Judge to convey the prisoner to the court to be held in Calhoun county, and deliver him to the Sheriff of Calhoun county, and the Sheriff of Calhoun county ordered to take the prisoner into custody.

A certified copy of the recognizance of witnesses and of the record of the case in Jackson county, together with the original indictment, was transmitted by the clerk of the court in Jackson to the clerk of the court in Calhoun. This transcript of the record from Jackson county did not contain any part of the transcript from Holmes county to Jackson, nor a copy of the indictment, nor did it contain the affidavit of prisoner for a new trial, or the plea of former conviction, the replication, demurrer, or other papers filed, but did contain a certified copy of the minutes of the court thereon, including finding of the jury and all orders. The clerk of the

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court of Calhoun county issued a *venire facias*, and the prisoner was put upon his trial without any arraignment in Calhoun county, but as the record states, "*the prisoner having been previously arraigned, plead not guilty.*" No suggestions of diminution of the transcript of the record was made by the prisoner, nor was there any demand for any of the papers. The jury were called, empannelled and sworn. After hearing the evidence, argument of counsel and charge of the court, the jury retired, and afterwards returned into court with a verdict of guilty. A motion in arrest of judgment was made, and among the grounds for the arrest, the prisoner alleges the absence of these papers from the transcript, and "that the defendant has not been tried upon any sufficient indictment of file in the Circuit Court of Calhoun county, Florida, and that it does not appear from the record and papers of file in the Circuit Court of Calhoun county that there is on file in said court any indictment against him for the murder of Samuel McQuage," and that the original indictment found by the Grand Jurors of Holmes county, or a paper purporting to be said indictment, was read to the jury who tried him, without being first filed in the Circuit Court clerk's office of the county of Calhoun."

While the motion in arrest was pending, the State, by her Solicitor, moved to file upon his affidavit the following papers as of the 15th day of May, 1860, viz: the one purporting to be the original indictment found in Holmes county, which had endorsement of filing thereon, by the respective clerks of Holmes and Jackson counties; and the other purporting to be a certified copy of an indictment found in the Circuit Court of Holmes county; which motion was allowed, to which the prisoner excepted. The motion in arrest of judgment being denied, the prisoner was sentenced. A writ of error is sued out to this court under the statute. J. F. McClellan for appellant, who cited, Harrell vs. The State,

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2 Ala., 56; 9 Paige, 572-4; Sedgwick on Statutes, 323, 324, 347, 292, 319; 8 Yerger, 170; Laura vs. The State, 26 Mississippi, 174; 13 Smedes & Marshall, 260.

FORWARD, J., delivered the opinion of the court.

There are fifteen errors assigned in this cause; of these the first ten involve the same question, and will be considered together. They are as follows, viz:

First. The record of the court in Calhoun Circuit Court was not such as judgment and sentence could be entered up against prisoner.

Secondly. Because the record did not show a perfect transcript of the proceedings in this case in Holmes and Jackson counties.

Thirdly. The record from Holmes county did not embody a copy of the indictment against the defendant.

Fourthly. The orders changing the venue from Holmes to Jackson and from Jackson to Calhoun, do not comply with the statute.

Fifthly. The transcript from Jackson county does not embody the transcript of the record from Holmes county.

Sixthly. It does not contain a copy of the indictment against defendant, or any paper upon which he could be tried, for any offence known to the law.

Seventhly. That the transcript of the record from Jackson county does not set out and contain an affidavit for new trial, a motion to amend the record, a plea, demurrer, replication, a copy of indictment and exceptions taken, and other proceedings.

Eighthly. The record of Calhoun county did not contain any indictment or copy of file upon which the prisoner could have been tried or was compelled to answer.

Ninth. It was error to try prisoner upon a paper purport-

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ing to be an original indictment from Holmes county, and it should not have been read to the jury.

Tenth. That the record is otherwise imperfect, defective, erroneous and unintelligible, and does not give the prisoner the benefit of the proceedings had in his case in the counties of Holmes, Jackson and Calhoun; that he is unable to avail himself of his exceptions taken in his case in Jackson county, and which were signed and sealed in said court.

The statute authorizing the change of venue in a criminal case provides that "the prisoner shall be remanded into the custody of the proper officer, who shall convey him to, and have him imprisoned in the jail of the county where he is to be tried: in all such cases a *certified copy of the recognizances taken, and of the record of the case, and the proceedings thereon, with all other necessary papers*, shall be transmitted to the clerk of the court in which the trial is to be had, who, upon receipt thereof, shall issue a *venire facias*, directed to the ministerial officer of his court, and any and all the proceedings which may be had in the trial of such criminal shall be the same as though the case had originated in that court;" "and all such cases so removed shall be tried in the same manner in the county to which they are removed, as if the offence had been committed and the prosecution originated in the county to which they are so removed." *Thomp. Dig.*, 525.

In considering the errors, it becomes necessary to give construction to this statute, in order that it may appear whether it was satisfied and jurisdiction in consequence thereof given to the court held in the county to which the venue was changed.

The legality of the order for changing the venue both from Holmes to Jackson and from Jackson to Calhoun, is not questioned; it is, however, urged that the record of the court was not such as judgment and sentence could be en-

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tered upon against the prisoner, and the various defects pointed to in the assignment of errors.

Among them it is contended that the statute required a certified copy of the indictment to be transmitted to the clerk, and that this was necessary to give jurisdiction to the court to which the venue is changed, and that the original indictment is not a satisfaction of the statute.

There is no doubt but that in strict legal construction, an indictment duly presented to, and received by the court, is a part of "the record of the case," but the question arises, was this the meaning of the Legislature in the use of those words, and if so, was it the transmission of the copy of the record which gave jurisdiction to the court, or the order changing the venue? It will be observed that the statute, after authorizing the change of venue and prescribing how it shall be done, goes on to say, "*in all such cases a certified copy of the recognizance taken, and of the record of the case, and the proceedings therein, with all other necessary papers, shall be transmitted to the clerk, &c., who, upon receipt thereof, shall issue a venire facias,*" &c.

We think the Legislature, in the use of the words "the record of the case," meant the *minutes* or entries on the record book of the court, and thereby did not intend to include a copy of the indictment, which, from the well known practice of our courts, never is copied on the minutes of the record of the court, and this view is strengthened from the fact that they, in addition thereto, use the words, "*with all other necessary papers.*" What "*other necessary papers*" did they mean? It is clear they meant such *other* papers as were not entered upon the minutes. Recognizances, if taken in open court, are always entered upon the minutes of the court; they therefore had to be certified. This was a necessity provided for, but it was not of necessity to certify a copy of the indictment.

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The well established policy of all our courts, is to try the prisoner upon the indictment presented to the court, and not upon a copy of the indictment. Never is a copy resorted to unless by express provision, and fully authorized and required by law. This practice being so uniform and considered the most correct and salutary, and more consonant with a proper regard to the constitutional provision for presenting an accusation under a criminal charge, that we cannot but consider our Legislature included the indictment as one of the "other necessary papers." Under this view of the statute, we think the order of the court made in Holmes county was pre-eminently correct, and that had not said order directed the sending forward the indictment, it would have been the duty of the clerk to have sent the same.

The order changing the venue from Jackson to Calhoun is silent as to what papers should be transmitted. The duty, however, of the clerk is prescribed by the statute, and we are to presume he performed his duty unless the contrary appear. The record shows the order changing the venue, a copy of the recognizance taken, a copy of the record, and the indictment. It is presumed the prisoner was tried on the original as is admitted.

It does not appear from the record that the prisoner, before going to trial, made any suggestions of a diminution of the record transmitted, or made any question of the sufficiency of the transcript, or made application for any paper whatever, nor did he make any objections to going to trial, either in Jackson or Calhoun county.

After the conviction in Calhoun county, and in the motion in arrest of judgment, for the first time it appears the prisoner raises objections to the sufficiency of the record.

In considering these objections and the time when they should have been taken, and whether fatal in error, we are to ascertain whether the court in Calhoun county, where

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the prisoner was tried, and at his trial had jurisdiction of the case, which involves the enquiry as to whether the order changing the venue vested the jurisdiction, or whether the transcript of record, &c., were essential to the order to give the jurisdiction.

This is determined by asking whether the jurisdiction could be in abeyance? That it could not be in abeyance is clear, therefore, when the court in Jackson county adjourned without revoking the order changing the venue. We are of the opinion the jurisdiction vested *eo instanti* in the Circuit Court of the county of Calhoun.

It follows then that it is not the certified copy required by the statute which confers or creates the jurisdiction. The transcript is simply the *evidence* of a fact which already exists independently of it. *Shifflet's Case*, 14 Grattan, 669.

We do not wish to be understood as deciding that the court in Calhoun, to which the venue was changed, could rightfully try the prisoner in the absence of the indictment, the copy of the order changing the venue, or any other copy of the record of the case, or any other necessary paper being *evidence* of the charge against him. But we do hold that when the clerk is in possession of what purports to be a full transcript of the record, the indictment and evidence of the charge and change of venue, that this is sufficient to authorize him to issue *venire facias* as directed by the statute, and the court can proceed with the trial, unless satisfactory objections are made apparent, for the presumption of law is in favor of the correctness of the proceedings. *Ward vs. The State*, 28 Ala., 59.

In such cases there is no doubt the prisoner may raise the question of the sufficiency of the transcript of the record, or the proceedings in the case, and may demand and have furnished him all necessary papers, and the prisoner should not be forced to trial without them.

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Before going into a trial, the prisoner, if he has any such objections to make, should object to the informalities of the transcript of the record, and by going to trial without objection, on the imperfect copy of the record on file, the prisoner waived all right to object in arrest of judgment, on account of the alleged imperfection. Doty vs. The State, 6 Black., 529; Laforte vs. The State, 6 Missouri, 208; Ellick vs. The State, 1 Swan, 329; Greenwood's Case, 5 Porter, 474; Matthew's Case, 9 Porter, 370.

The eleventh error assigned is, that the court erred, after the trial and conviction of prisoner, in ordering the clerk to file and mark certain papers in his office purporting to relate to his cause.

The permission given by the court was to file certain papers which the clerk had omitted to do. These papers are set forth to be the original indictment and a copy of the indictment. It appears that the original indictment had already been filed in both Holmes and Jackson counties. The copy of the indictment we have already considered an immaterial paper. We think that once filing was sufficient—there cannot be but one record of a case part may be in one court and part of it in the other. In this case the original having been sent on, the filing of the indictment once was sufficient for the purpose of furthering proceedings. At any rate, this objection, like the others, should have been raised before the trial. The court having ordered it to be filed after the verdict, did no more than a court has a right to do under the general rule. The record being in *fieri* and under the control of the court during the entire term, its completion at any time before the final judgment relates back and heals previous informalities. Franklin vs. the State, 28 Ala., 9; The State vs. Mathews, 9 Porter, 390; The State vs. Greenwood, 5 Porter, 474.

The opinion of the court is, that where an original indict-

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ment or any other papers have been transferred on a change of venue to another county, at the term at which the same was transferred for trial, the court may at any time during that term, as well after as before conviction, cause the clerk to endorse the indictment "filed," to date the endorsement according to the fact, and file it. Over such matters the court has control during the term, and may alter, amend, or set them aside as justice may require.

The 12th, 13th, 14th and 15th errors assigned will be considered together, and are as follows:

Twelfth. That the judgment and sentence of the prisoner upon the record was against law.

Thirteenth. That the finding of the jury was against the weight of evidence in the case.

Fourteenth. The court erred in charging the jury that no affront by base words or gestures, however false or malicious and aggravating with the most provoking circumstances, will free the party killing from the guilt of murder, and this rule will apply in every case where the party killing upon such provocation makes use of a deadly weapon, or otherwise manifests an intention to kill or to do some great bodily harm.

Fifteenth. The verdict was against evidence.

The following is the testimony as appears in the bill of exceptions:

Nancy Sutley says: I know John Ammons the prisoner; he left my house with Samuel McQuage the deceased, in the morning, and at night he returned with him, and when they drove up to the yard fence, I think Ammons called out to Carrol, (Joseph). After he called out to Carrol he cursed McQuage and kept cursing him, trying to make him get up and let him go home with him. McQuage would tell him to let him alone, that he had nothing against him. Mc-

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Quage asked for water, and Carrol told him to come to the water shed and get it, that there was water there. McQuage came to the pail and took a drink of water and turned round and set down in the door. When McQuage left my door he went out to the fence and got over the fence, and Ammons came to him, (McQ.,) and said G—d d—n your old soul, I intend to kill you. McQuage said, Ammons go away and let me alone, I have nothing against you. Then Ammons commenced striking over so, (showing the manner.) I did not see what he had in his hand; they scrambled over the fence into the yard, and they both came right on by my door, and Ammons was beating him, (McQ.,) and he kept begging him to let him go, that he had nothing against him. They went on by the corner of my water shelf, and there Ammons knocked him down with his gun. It was there he gave him the last blow, and McQuage said, can't you let a poor old man go, and Ammons said no, G—d d—n you, I intend to kill you. At the lick of the gun the old man fell, and I did not hear him fetch but very few struggles. Ammons turned from McQuage and came to my door, and I said, Mr. Ammons you have killed him. He says yes, G—d d—n his old soul, and what I have not done with my gun I have done with my knife. He laid the muzzle or barrel of the gun on my water shelf, and said the breech is here in the yard somewhere, and I will get it, and have it mended some time. I sent off Carrol for company, and when he started Ammons stooped over the body of McQuage as if he designed to take hold of him, and says, now G—d d—n your old soul, if you were alive I reckon you would know that you could die and I could live. He, (Ammons,) then came into the house and set down on my table, and cursed the old man, (McQ.,) all the time while Carrol was gone for company.

When Carrol returned, he did not get any company, and I told him to stay there while I was gone for my son who

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lived about 200 yards or more from my house, I took a piece of lightwood with fire and went out after my son. Ammons came out and went with me, walking all the way by the side of the road, and cursing McQ., and when we got to my son's, Ammons said, Harry don't be scared; I have killed old man McQuage down at your father's.

I took my son and his wife and children, and went back home and Ammons went with us. My son said, John you have killed him, have you, and Ammons replied yes, G—d—n his old soul, I wish it was to do again. I left my son and his wife to watch McQ. while I went off for company. I took Joe Carrol with me; I left Ammons with my son and wife, and he was there when I got back. I went on to Field's and got him to let his little son go with Carrol for company, and I returned home. When I got back I found Ammons standing on the outside of the fence. He asked me what I was going to do, and I told him I was going to build a fire by the old man to watch until I could get company, and he then said to my son, Harry, if the Sheriff comes after me tell him I will be out at my father-in-law's (whose name is Hodge.) He then left, and I saw him no more until he was taken and brought back. This occurred in September. It was last September a year ago, at night; it might have been two or three hours in night, I am not certain, they got there an hour or an hour and a half in the night. I will not be certain as to the time of night, in Holmes county in the State of Florida. The cart stopped at fence, it may be ten or twelve steps and may be more, I never measured it—am not certain, wont be particular. McQ. fell close by the post of shelter to my house. Don't know how long it was exactly before I went to him after he fell. It might have been eight or ten minutes. He was dead when I got to him; I saw him when taken up for Coroner's inquest and noticed the wounds. One made cross his shoulders like cut with a

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knife, another above his collar bone, and the other below collar—looked like struck with a knife. Knife was lying at his feet where he fell in the yard. It was a pocket knife, white handle; it was a common sized pocket knife, had blade to it; breech of gun was lying where McQ. was lying; knife was bloody. I was standing in the door when he fell, (about as far as the door at the end of jury box.) Carrol was not gone long. McQ. was lying on his face; he was bloody all along his breast, and his pockets were very bloody. Ammons remained with me until Carrol came back the first time. Ammons' hands bloody, and the fore part of his shirt bloody on the bosom.

Samuel McQuage was a very large man. McQ. came to my house that night; he pulled out his money and showed it, he had \$55 in gold. He had it in a purse; he put it back in his purse and tied it, and put it back in his pocket, when he started from my door. I saw his pocket examined after his death. Small pocket knife and one five cents in silver in the bottom of his pocket. Don't know if any thing else was found in his pocket—purse and \$55 not found in his pockets. Was large fire light in my house when they came, and I got up and put in another piece. The light was there during the difficulty.

Cross examination. I suppose I am near seventy years of age, fifty or sixty, or seventy, or something along there. I was excited; at times I forget like other old people. Don't remember that I stated it was forty or fifty yards from my house to yard fence at trial in Jackson. He did not tell me at my house or my door that he killed McQ. in his own defence. I heard him tell my son so at his house. I might have told he did say so at my house at Marianna, but I don't remember it; but I must have been not at myself properly if I did—he never did. I never made contrary statement to what I do now, as I remember of, before the Coroner; if

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I did I must have been out of my senses, and I don't think I was. Did you say at Marianna that you did not hear McQuage and Ammons quarreling? I never stated that I did not hear a fuss, for Ammons was cursing; but I did not hear McQuage quarreling. I did not state before Parish that there was a dim light in the house. Don't know that Ammons tried to get Carrol to go home with him; but McQuage tried to get Carrol to go home with him. Don't know how long after Ammons left my house until he was arrested. Don't know which way he went when he left here. Ammons came in morning about breakfast with us. McQuage came along, and Ammons said he was going to Ucheeanna with him, and he accordingly left. Left Carrol sitting in my door when I started to my son's. I found him there when I returned; I saw the pocket examined the next morning. I saw his sister examine the pocket some hours after Ammons left. Ammons said McQuage had abused his parents; I heard his mother was dead—grave near the house in old field near by, I did not hear A. say that is where you wanted to put me. Said he had killed a d—n Scotchman and would kill two or three more before he would be satisfied. Good long blade in knife—Ammons' pocket knife. Star-light light; chimney in end of the house; can't say which end. I could see out and exern. I live now in Alabama, but house in Holmes. I said I prayed that justice might be done; I have no prejudice against Ammons. My husband pays my expenses. Yelverton lent \$5 to come down, to be paid again.

Re-examination. Pocket bloody on each side, and Ammons' hand was bloody also. But little while after McQuage was killed until Ammons and I went up to Harry Sutley's. While Carrol was gone, Ammons came into the house and set on the table. He came in immediately after McQ. fell.

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It was not half an hour after we came back from Harry Sutley's before Ammons left.

Cross examination. Ammons' hand was bloody when he came to the door, blood on his breast and his hands.

A. C. Munroe, says: I know the prisoner, I know Samuel McQuage. The last time I saw Samuel McQuage was the day preceding the night on which he was killed. I saw him at Ucheeanna in the county of Walton. Ammons and McQuage came together to Ucheeanna in an ox cart; came in few yards of my store, and McQ. took the oxen out and came to the store and asked me about a land warrant, and said if I would give him what I had offered him he would let me have it, and I told him I would do so. About 12 o'clock or nearly 12 o'clock, I told him I would go home and get the money, and when I came back he left the land warrant with me to make out the transfer by Saturday, when he said he would come back. We went up to Campbell's store together, and I went to change money with Campbell in back room. I told Campbell that transfer was not made, and I wanted him to witness my payment of the money, and counted out to McQuage \$64. John Ammons, Eli Right, John Campbell and Neill Campbell were present. McQuage said he would come on Saturday and make transfer, but in event of his death, requested Neill or John Campbell to assign in my name. McQuage then said to Ammons, I want you to shoot your gun off before we start as I do not like to travel with a loaded gun, or something to that effect. Ammons remarked he would not kill a man for as little money as that. Don't remember any thing more.

Cross examination. Are acquainted with road from Ucheeanna to Mrs. Sutley's—two houses between them. Ten miles between Ucheeanna and Mrs. Sutley's. Ammons and McQuage left Ucheeanna about two or three o'clock in afternoon. They left friendly; I know of no fuss

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between them. McQuage was a strong man. They did not seem to be under the influence of liquor when they left, but they took a half gallon of liquor with them when they left. I think they took one drink with me. Do you not know that Mr. McQuage, when drinking, was quarrelsome? (Objected to by State; objection sustained—excepted to.) South side of Mrs. Sutley's thickly settled. McQ. thirty-five or forty years old.

Re-examination. When he told Ammons to shoot off his gun, I thought McQuage was joking. He was a man of good size. McQuage was about grown in 1838.

Daniel Brownell says: I know John Ammons, I knew McQuage. I was the Sheriff of Holmes county in September, 1858; I was ten or eleven miles behind where Ammons was first. I went in pursuit of him; went up in Alabama to Butler county. I first took trip on West; I was gone three days, and then came back, and went into Alabama. I had a warrant when I first undertook to arrest him. I first went to his father-in-law's where his wife was.

His father-in-law's name is Hodge. This was about sun up the morning after the killing. I did not find him there; I first came up with the prisoner in Elba, in Coffee county, Ala., one hundred and fifty miles from Holmes county to where he was taken. He was taken about seven days after the homicide, but I will not be positive. I helped to bring him back to Holmes county; I saw no mark of violence on the prisoner. I had some opportunity of seeing. I was present when prisoner was committed; I was the officer that had him in charge.

Cross examination. I had no legal process to take him in Ala. He did not try to get away; I went into Butler county, Ala. A lawyer living in Elba. Ammons more than twenty years of age; twenty-five miles from my county to Alabama line.

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Re-examination. Four persons with me when I brought the prisoner back to Fla. From Mrs. Sutley's to Hodge's three or three and a half miles.

EVIDENCE FOR PRISONER.

Harry Sutley says: Seventh day of September, 1858, John Ammons and McQuage came to my house in the night. Ammons got out of the cart and said he was going to stop, and came into the house some hour or hour and a half before the difficulty. From the way they talked the parties appeared friendly. Ammons asked me if Joe Carrol was up at my father's, and I told him he was. Said he was going on up there to try and get him to go home with uncle Sam (meaning McQuage.) This was between half hour or an hour in the night; saw Ammons drink some, and brought a bottle of whiskey in the house, and set it on the table. Ammons staid there between quarter, half and three quarters of an hour. It was about three quarters of an hour before my mother came. When Ammons came to edge of my yard I was standing in the door; he says don't be scared Harry, I have killed McQuage down at your father's. I said, John, you have not, have you? and he replied yes, I have, be d—d if I haven't. I asked him what he did it for, and he replied, I did it in self defence. He said that McQuage said he was a d—d rogue, &c., and that his daddy and mammy were so before him. I asked him how he killed him, and he said he killed him with his gun and knife, and said if he was hung a thousand times he would be hung on a just cause, and if it were to do over he would do it again. I saw a couple of scratches like done with finger nails about the stomach. I went down—common pocket knife, white handle; (shows a knife.) Looked in cart next morning, pork, jug, whiskey.

Cross examination. McQuage cut or stabbed over collar bone and below; across shoulders and across the head,

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which last wound was three or four inches long. Saw the gun, common sized rifle gun; it was broke off at the breech. My wife and children, and Ammons, were all that were with me, while Mrs. Sutley, my mother was gone. Ammons part of the time in the house, and then got up and went outside of the fence to Mr. McQuage's cart. I was in the yard when Ammons went out; my wife was in the house. From my mother's to McQuage, between a mile and a half and two miles.

Re-examination. From my house to first house towards Ucheeanna, about eight miles. They had no barrel in cart when they passed my house in morning. From my mother's door to the fence, it is five or six steps. It was a starlight night. Nearly day re-examined his pockets for key to send over to get burial cloth. Several present. After I first went there I went with Ammons and Carroll up to body. When his sister re-examined his pockets she found knives, (2), and twenty cents; piece of tobacco. Examined cart, did not find any money; did not none of the time—Carroll. This about an hour by sun; Mr. Neal Gillis, Parish, Grimsley and Hollis were with me when the cart was examined. Ammons left my mother's three or four hours in the night.

Joseph Carroll says: Ammons came to Mrs. Sutley's with McQuage, and told me he wanted me to go home with McQ. I told him I could not as I was with old Mrs. Sutley's and could not leave her. He offered me 25 cents if I would go home with McQ. Affray occurred about an hour and half in night; tolerably light night. They seemed to be friendly. After I told Ammons I could not go with McQuage, Ammons awaked McQ. up. I took them to be friendly. McQuage asked if he could get water, I told him he could get it at the pail, and to go with me and get it. We went for the water; no quarreling, but seemed friendly

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up to time McQ. went to get the water. After getting the water and being there awhile, I came back with him to the cart. I hitched oxen to an oak and fed them. They did not drink spirits. When I hitched the oxen I fed them. I got up in the cart where there was a barrel of pork, and the pork seemed to be at the front part of the cart and weighed down the steers' necks, and McQ. got me to get up and roll back the pork. I did not think McQ. was sober, but could travel about. Ammons appeared to be drinking some; then I got down out of the cart where McQ. was, and Ammons spoke to McQ. and asked McQ. if he had not called him dishonest that day, and McQ. replied and said, John, I don't know whether I did or not, we were both drunk and fools, and John Ammons said you did; McQ. said, if I said it once I say it again, I don't believe you are honest, and Ammons says you don't, and McQ. said I don't, and when he said that Ammons struck McQ., then McQ. commenced backing towards the fence; there Jno. Ammons kicked McQ. and McQ. then told Ammons to stand back and let him, McQ., get out of the way; by that time McQ. was getting nearer to the fence, and Ammons struck at him with the gun, he missed and the gun struck the ground close by. McQ. had got to the fence, and Ammons set down the gun by the fence. Ammons caught McQ. by his right arm with Ammons' left hand, and then he struck at McQ. two or three licks (that way,) about the fence, showing the way in which blows were stricken, then both went over the fence together, Ammons taking his gun with him; they both fell where they were; McQ. arose a little first, and commenced backing, and Ammons went right after him, and McQ. was backing and begging Ammons to stand back. When McQ. had backed about seven or eight or ten steps from the fence, I heard the lick, and when I heard the lick I heard McQ. fall; then Ammons started back towards the fence where I was

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coming, and saying his mother was lying off there in the old field, and his father he did not know where he was, and no person should call them rogues and dishonest, and when Ammons came back towards me from McQ., I went around the house and went into the back door; then Ammons came to the front door and told Mrs. Sutley she need not be scared, and *said he had done just what he intended to do, and what he did not do with his gun he did with his knife, and that if he was not dead he would kill him.* I then left the house and went off after some company, and when I came back Ammons was still there, and was out in the yard, and when I went into the house and got a light to go again after company, (for I had got none) he took the light out of my hands; he held the light over McQ. and said, that is what a man gets by calling men dishonest and d—n rogues; and I saw a gash on McQ.'s shoulder, and said, John, you have cut him, and he said yes, I did, and by G—d what I did not do with my gun I did with my knife. Mrs. Sutley did not faint as I saw; I did not rub her with camphor; when they went over the fence I was in about five feet of them; don't know which was on top; I was not excited much.

Cross-examination. Fence about three feet high where they got over or fell over. I did not see McQ. make *any attempt to strike Ammons; McQ. said to Ammons, "stand back and let a poor old man get out of his way."* When I came back from Peel's Mrs. Sutley was in the door where I left her; McQuage fell about six or eight feet from the house opposite the corner of the house; he called McQ. and told him to get up; I was then standing on the ground by the cart; I heard no violent language from Ammons before the thing commenced at the cart; it was about fifteen steps from the cart to where the body fell.

Dr. C. McKinnon says: They came into my store that day and appeared to be friendly. Did they buy a pack of

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cards at your store? Objected to; objection sustained and excepted to by counsel for prisoner.

Edward Barnes says: Did you meet McQ. and Ammons on the day preceding night of the homicide on the road? Answer: I met them about three miles and two or three hundred yards from Ucheeanna on that day. What were they doing? Answer: When I first saw them they were sitting down in the cart, and when we got pretty close to them Mr. Ammons got up, set down on top railing of the cart body. I stepped up and looked over in the cart body, and saw some cards lying in the cart body, and a couple of pieces of tobacco lying close by. The cards and tobacco were lying on bed cover, or something spread in the bottom of the cart; they appeared to be friendly; can't say whether they were in liquor or not; saw a jug; don't know what was in it; saw a barrel in the cart. We were not with them exceeding five minutes; cart moving when I first saw it; they were behind the barrel in the cart.

Cross-examination. Suppose the sun was about two hours or two hours and a half high; ox cart.

Hiram Goss says: Was not acquainted with either Ammons or McQuage. I met Ammons three miles or above, from Ucheeanna as they returned; he was in the cart: I said your playing old sledge, and they said yes, and Mr. McQ. said, we were just playing to amuse ourselves along, and I observed to them and inquired the distance; McQ. pointed back to mile post on the side of the hill; I saw cards lying on quilt in cart; I saw a little piece of tobacco lying by the cards; they seemed to be friendly; a barrel in the fore end of the cart, which I supposed was a pork barrel; McQ. forward in the cart, and Ammons in stern; sun about two or three hours high.

Albert Parish says: I saw Ammons when brought back from Alabama, when he was brought before a Justice of the

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Peace on the 18th Sept., 1858. I saw a scratch on his left side; I was five or six feet from him, the place looked a little purple. I helped to examine for McQ.'s money next morning; we examined the cart; we first examined the coat lying in the cart; this about sun up good. We found no pocket book in coat; we found no pocket book in his pocket, shattered fodder in balance of cart. We examined the cart body and under the sides of the barrel; I went on one side and D. Neil on the other, but we found no pocket book at all; moved all the fodder and looked under each side of the barrel; I examined his pants pockets, about day light with D. Neal. We found a knife, one blade; small pocket knife. Angus Gillis and D. Neal examined his pockets; a pipe and piece of tobacco in one pocket, a twenty cent piece. I am certain that they are the men who examined the pockets; I am certain that McQ.'s sister did not examine; blood had run down on left side and in the pockets as he lay; if there was any, I saw no blood about the mouth of the pocket. When she testified before me, she said she had a dim light in the house, and she was afraid as they were fighting down towards the house; she was afraid they would come in the house. I knew both Mr. McQ. and Ammons. Did you ever see them playing cards at any time for money? Objected to by the State; objection sustained and excepted to.

Was or not McQuage given to card playing? Objected to by the State; objection sustained and excepted to.

What was McQuage's disposition when card playing? Objected to; objection sustained and excepted to.

Was McQuage, when dissipating, overbearing and quarrelsome in his disposition? Objected to; objection sustained and excepted to.

John Ammons' mother is said to be dead; was reputed to be dead before this difficulty. His father is alive; his

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mother buried in old field called Stanley Place, about two or three hundred yards from Mrs. Sutley's; have known prisoner some six, seven or eight years, and may be more; I suppose he is about 21 or 22 years old; McQuage is a stout man, reputed a strong man; had character of brave man.

Cross examination. Small scratch about two inches long on left side, I think about the bulge of the ribs; I paid but little attention to it; Mrs. McCaskill was McQuage's sister; Angus Gillis and D. Neal, and several of the jury, were there when the pockets were searched; I don't think she searched the pockets after I got there, which was one or two o'clock; I don't remember any blood outside the pocket; don't know whether blood was inside the pockets; blood on the ground where he lay; might have been blood on the pocket, but I don't remember to have seen it.

Re-examined. Fore part of that night was a common starlight night; could not see a man very far; could see a man ten or fifteen yards from me; don't think I could have seen the arm of a man at that distance; he was lying on his face and one leg drawn up when I first got there; I saw a knife which was a white handled knife, and had been a square saw bite on it, straight blade; common pocket knife. I saw the breech of a rifle lying not far from the knife, and a barrel of a gun lying on side of a sill; I returned knife to clerk of court; the knife I saw exhibited on trial at Marianna last fall, was black handled knife; it was larger than the one I picked up by McQuage; some larger and heavier. McQuage was a strong man.

Benjamin Sutton says: Don't remember what time of day when pocket book was looked for; I did not look for it; don't know that any one looked for it. Daniel McQuage found in the cart a big book with \$20 in it; the barrel turned and Daniel McQuage picked up the day-book with the money in it; this was when we were taking cart home

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from Mrs. Sutley's, and about 150 yards from her house; this was in the evening like. I saw nothing of day-book until Mr. McQuage found it, who handed it to Mr. Neal who was walking behind. The barrel turned a little over as we were going along; keys were in the book which contained the money; have seen Mrs. Sutley a time or two; don't know what her feelings are towards Ammons.

Did you or did you not ever hear Mrs. Sutley say that the defendant ought to be hung, and that she expected to see him hung? Asked for the purpose of showing prejudice in part of Mrs. Sutley, and for no other purpose. Answer: She appeared to be angrily disposed towards the defendant. I heard her talk sorter angry about Ammons; don't know how long she has been living in Holmes county; had been there about two years before McQuage was killed.

John Milton says: My distinct recollection of the examination at Marianna on former trial of this case, Mrs. Sutley stated, to the best of my recollection, that Ammons said while sitting on the table in her house before she went to Harry Sutley's, that he had killed McQ. in his own defence, and also that the distance from her where she was standing to fence where McQuage was, was as far as from court house to gate near the court house, which witness supposed was from 35 to 40 yards.

Cross examination. She may have said it was not further than from court house to gate.

Jesse Sutton says: I knew Joe Carrol in Alabama; was not acquainted with his general character for honesty; heard his neighbors talk about him pretty generally; his character was pretty bad.

Cross examination. Heard more than three or four speak of his character; I knew him in Barbour county, Alabama.

Albert Campbell says: I knew Joe Carrol in Alabama;

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knew his general reputation for honesty; it was tolerably bad; reputed to be dishonest.

Cross examination. I have been in Florida about twelve months; moved from Barbour county, Alabama. Came from Alabama to better myself; I lived in four miles part of the time and part of the time in half or three quarters of a mile of Joe Carrol; it was reported in Alabama that I was indicted before I came away from there; I don't know it to be the case; don't know that it was for selling whiskey to negroes.

Re-examination. I heard I was indicted for selling whiskey.

Benjamin Sutton says: Knew his reputation in Alabama from report; bad for honesty.

Henry Jones says. I know Joe Carrol; I traveled with him from Marianna to Holmes last summer or fall. Did Joe Carrol steal a turkey on the way to Holmes, and Mrs. Sutley cook it? Objected to; objection sustained and excepted to.

D. J. Brownell, recalled by the State, says: Was present at examination before the committing Magistrate; I had charge of the prisoner as the Sheriff of Holmes county; I was with prisoner all the time during the examination. Did you see prisoner show a bruise? Witness answers that prisoner said he could show a bruise, and the State asked that the answer might be ruled out from the jury, which was done, and the prisoner excepted; I was right there with him all the time; I did not particularly; I stripped him next morning after examination, and I put shirt, pants and drawers of my own on him, and had his clothes washed; I saw no mark of violence on him; I heard Mrs. Nancy Sutley testify before committing Magistrate, she said she had a fire that night and could see, or words to that amount; don't remember that she said it was a dim fire; I have known Ammons a long time, he was counted much of a

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man. About the time of the killing he was regarded as being much of a man for muscular power.

Cross examination. Ammons was considered a brave man; I thought nothing of examining for wounds; I was right with Ammons all the time of trial; was attentive to all that occurred as much so as I suppose, any one else.

Re-examination. Have known Joe Carrol about two or two and a half years; have never heard anything wrong of him in the county where I now live.

Joseph Carrol called by the State, says: Was present at time of examination of McQuage's pockets; one of the pockets had some blood on it; on the pocket and some inside the pocket; when it was turned to get the things out; I will have been in Florida two years next November.

Admission by the State. Admitted by State that a barrel of pork in the fall of 1858, was worth from \$20 to \$25.

A. C. Munroe recalled by the State. I don't know that I know anything about barrel of pork, except that I saw McQ. have a barrel of pork in his cart before I paid him the money about which I testified in my examination in chief.

Cross examination. One more store in Ucheeanna besides mine, and I was not with him all the time after I paid him the money; he was in town an hour or two after I paid him the money.

Benjamin Sutton called by the State. I carried the barrel of pork from Mrs. Sutley's to Mrs. McKaskill's, who is the sister of McQuage; I don't know whose pork it was; Mrs. McKaskill and McQuage lived at same place.

Cross examination. Don't remember exactly what Mrs. Sutley said about Ammons, I think she said she wished he was cut up in inch pieces; don't remember what she said should be done with him; don't remember much about what she did say.

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If credit is given to this testimony and the admissions of the prisoner, there can be no doubt that the verdict of the jury was according to the evidence. It is urged, however, by the counsel for the prisoner, that they should have disregarded the testimony of Mrs. Sutley; that her manner of testifying, her expressions of ignorance on many questions, her feelings towards the prisoner, and conflicts with the other witnesses, should have rendered her testimony unworthy of credit.

Upon examining the evidence, it will be seen that attempts were made on the trial to impeach her, as well as the witness Carol. The testimony on both sides was before the jury, and the degree of credit was with them. This court has been frequently called on to review the question as to how far it will interfere to set aside a verdict and grant a new trial where there has been a conflict of testimony, and we have ruled as we do now, that where there is conflicting evidence, and the verdict is not manifestly against the weight of evidence, the court will not interfere to set aside the verdict of a jury. *Macon vs. Tallahassee R. R. Co.*, 8 Fla., 299.

In this case the credibility of the witnesses was submitted to the jury, and the jury believed the testimony. It would be something rare for this court to decide on the degree of credit to be given to a witness, and to decide on the effect of the evidence. Were they to do so, they might justly be charged with usurping the province of the jury.

The counsel for the prisoner contends with much earnestness that the evidence discloses provocations which ought to extenuate the homicide, and that there was error in the charge of the court, and that the charge misled the jury.

By the statute law of this State, it is declared that, "*the common law of England, in relation to crimes and misdemeanors, except so far as the same relates to the modes*

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and degree of punishment, shall be, and the same is hereby adopted and declared to be in full force in this State." Thom. Digest, 489.

By reference to the common law of England as laid down in 1 Russell on Crimes, page 514, it will be seen that the charge is in the very words of the law as there stated. We are, therefore, of the opinion, that there was no error in the charge of the court, and that the judgment of the court upon the verdict was in conformity with the law and according to the evidence. The judgment of the court below is therefore affirmed.

Let this case be remanded to the Circuit Court in and for the county of Calhoun, and the judge holding said court be directed to cause the said John Ammons to be brought before him in open court, and nothing appearing why sentence of death should not again be passed upon him, said Judge, in open court, do sentence the said John Ammons to be executed at such time and place as the court may deem fit and proper, and that said court do cause said sentence to be carried into execution.

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TO NINTH VOLUME OF FLORIDA REPORTS.

ADMINISTRATORS AND EXECUTORS—

1. An *action at law* for a distributive share of an intestate's property cannot be maintained against the personal representative, although he may have expressly promised to pay.
2. Whether a final settlement in the Probate office *and an order to pay over to the distributee* will give the right to maintain such action—*Quaere?*
3. The settlement of an executor's or administrator's accounts in the Probate office does not change his character as *trustee*, and he will still hold any balance in his hands, for distribution, and not adversely.
4. Under the policy of the several statutes regulating the administration of estates, the rights of *creditors* and of *distributees* stand upon a different footing. While the statute of *non-claim* will operate as an absolute bar to the former, it will not prevent a recovery by the latter.
5. The object and design of the statute of *non-claim* is threefold: First, to facilitate the settlement of estates by prescribing a limit of time within which creditors and other persons having an interest should be compelled to exhibit their claims preparatory to a final distribution; second, to protect the executor or administrator in all payments which he might make *bona fide* after the expiration of the two years; third, to quiet the title of the legatees or distributees to the property received as such legatees or distributees.
6. Where there has been unreasonable delay on the part of a distributee to call administrator to account, he will be allowed, at farthest, only simple interest on his demands. *Amos vs. Campbell*, 187.
7. Property devised in trust, after payment of debts, is assets in the hands of an administrator, with the will annexed, for which the sureties on his bond are liable.

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8. The trustee cannot get possession of such property, except through the administrator, and therefore, may sue him and his sureties for it; and such suit may be brought without any order having been made by the Judge of Probate. *Woodfin et als vs. McNealy et al.*, 256.
9. An executor or administrator under the proviso of the 24th sec. of the Act regulating judicial proceedings, approved Nov. 23, 1828, may deny the signature of his testator or intestate to any bond, note, or other instrument purporting to have been signed by him, and also plead a want or failure of consideration by plea put in without being sworn to, and after the cause is called on the appearance docket, on giving reasonable notice, and the effect of such plea will be the same as at Common Law, that is, to require the plaintiff to prove the signature, and the defendant to prove the want or failure of consideration.
10. If the executor or administrator desires to throw the onus of proving the consideration on the plaintiff, he must put in his pleas under oath before the cause is called on the appearance docket. *Knight vs. Knight*, 283.

ADVANCEMENT—

1. An advancement to a husband by his father-in-law is an advancement to the wife.
2. An agreement between the father-in-law and the husband that the former would never enforce the payment of a debt due to him from the latter, but that the same should be considered an advancement to the wife; said agreement having been complied with by the father-in-law during his life, makes the amount of said debt an advancement, which ought to be brought into hotch-pot. *Lindsay and Wife vs. Platt*, 150.

APPEALS—

1. To give the Court of Appeals of the Territory of Florida jurisdiction of an appeal from a decree of the Superior Court, it was necessary there should be a *final* decree in the cause; appeals did not lie in that Court from interlocutory decrees or orders.
2. This court will not be bound by the decision of the Court of Appeals of the Territory in a case where it appears said Court had no jurisdiction.
3. When there has been no *final* decree in a cause, excepting the one appealed from, this Court may, on appeal, examine the whole case, so far as it has been acted upon by the Circuit Court, and all prior or interlocutory orders or decrees any way connected with the merits of the final decree are open for consideration, notwithstanding such order or decree may be one of a Court of

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Appeal affirming a similar order or decree of an inferior court. Griffin vs. Orman, 22.

ASSAULT—

1. An assault with intent to kill is not an offence known to the common law, but by statute of this State is made a *misdemeanor*.
2. There is a difference between an assault with intent to kill and an assault with intent to murder. An assault with intent to kill may exist where the party intends only such killing as amounts to manslaughter.
3. Whether a person indicted for an assault with intent to kill, had such intent at the time of the alleged assault, is a question of fact for the jury to decide, and in deciding that question the jury ought to act upon those presumptions which are recognized by the law so far as they are applicable, and the intent, like malice, may be either expressed, or implied and presumed where facts authorizing the presumption are proven.
4. The charge of the court shall be confined to matters in issue. The court is not bound to instruct the jury, at the defendant's request, that if H. had killed W., and the homicide would have been manslaughter and not murder, that they ought not to find him guilty of the assault with intent to kill." Hall vs. The State, 203.
5. An assault and battery with intent to kill, is an offence not embraced in the criminal statutes of Florida, nor is it known to the common law of England.
6. Under the statute of this State, assault and battery, and assault with intent to kill are offences of equal grade.
7. A person indicted for an assault with intent to kill, may, if the evidence does not support it, be convicted of an *assault*, which is by statute made the only *minor* offence of a kindred character.
8. It is error for the jury in this State, to find the defendant guilty of an assault and battery, under an indictment for an assault with intent to kill. Warrock vs. The State, 404.

ASSIGNMENT—

1. A transfer of personal property, including choses in action, rights and credits, valid were made, will be recognized by our courts, provided it be not contrary to good morals nor repugnant to the policy and positive institutions of the State.
2. There are no laws in Florida prohibiting a citizen of another State from a free disposal of his personal property, situated here, for honest purposes and without fraud.

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3. A *voluntary* assignment by the owner to an assignee in trust for the benefit of creditors, made in the State of South Carolina and valid by the law of that State, and which, if made in Florida with the intention of being used here would have been considered valid in this State, will operate upon property situate in this State.
4. In such assignments, the rule of transfer is the same in all choses in action, whether the same be an open account or promissory note.
5. Notice to the debtor is not necessary to a delivery and transfer of an open account thus assigned.
6. Fraud for want of delivery of possession of choses in action by the assignor to the assignee under such assignments is a question of fact to be determined by a jury in a cause instituted in common law courts.
7. An assignment for the benefit of creditors, executed in another State, valid by the laws of that State and valid by the laws here, will be enforced by the courts of this State against a subsequent attachment, although said attachment may be issued by one of our own citizens, and an open account due from a debtor to the assignor attached, and garnishee process issued previous to notice of said assignment to said debtor, *unless notice is required to be given by the terms or necessary effect of the assignment itself.*
8. Notice to the debtor of the assignor in such case (unless required to be given as aforesaid) is only necessary to prevent the debtor from dealing with the assignor so as to affect the rights of the assignee.
9. Where debtor of an assignor is garnished by virtue of an attachment issued subsequent to the assignment, and receives notice of the assignment, *pendente lite*, he should avail himself of the assignment in discharge by answer to the garnishee. *Walters & Walker vs. Whitlock*, 86.
10. B., without any writing whatever, but verbally and by word of mouth only, assigned, transferred and delivered to three of his creditors, constituting the firm of C., M. & Co., a package containing notes, drafts, &c., for near \$30,000, in trust, to collect and distribute the proceeds, as far as they would go, *pro rata*, between the assignees and his other "Charleston creditors," making no conditions or reservations in his own favor: Held, that this assignment was valid and irrevocable from the time of its acceptance by the assignees; that the privity or consent of the creditors was not necessary; that such assent will be presumed till the con-

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trary appears. *Matilda Brown vs. Chamberlain, Miller & Co.*, 464.

ATTACHMENT—

1. Where an attachment was levied upon the real estate of an absent debtor, and he dies pending the suit and before final judgment: *Held* that in a contest between a mortgagee (seeking to foreclose a mortgage on the same property which was executed after the date of the levy) and the purchaser, under the judgment obtained in the same suit against the administrator, the lien of the attachment survives, and the purchaser will be protected in his title.
2. But whether such lien survives, so as to prevail against a *creditor*, who is seeking to obtain payment of his debt, under the preference given by the statute—*Quære?* *Loubat vs. Kipp & Young*, 61.
3. A judgment against a garnishee in a suit commenced by attachment is annulled by the dissolution of the attachment even after plea pleaded. *Mitchell & Savil vs. Watson*, 160.

BILLS OF EXCHANGE—

1. Although the drawer has no funds in the hands of the drawee, yet if he has a right to expect to have funds in the hands of the drawee to meet the bill, or if he has a right to expect the bill to be accepted by the drawee in consequence of an agreement or arrangement with him, or if upon taking up the bill he would be entitled to sue the drawee or any other party to the bill, then in every such case he is entitled to strict notice of the dishonor.
2. An agent is entitled to notice of the dishonor of his bill on his principal, though he had no funds in the principal's hands, and the payee had no knowledge that he was acting as agent.
3. The payee of every draft or bill takes it upon the implied condition that he is not to hold the drawer liable without giving him notice of the draft or bill he dishonored, and if such notice be not given, it is at the peril of the payee. *Pitts vs. Jones*, 521.

BOOKS AND PAPERS.—(See evidence.) 71.

CATTLE—

1. In a written bill of sale of cattle, where the marks and brands of the cattle are expressed, the maxim, "*expressio unius est exclusio alterius*," (the express mention of one thing implies the exclusion of another,) is applicable. The presumption is, that having expressed the marks and brands of some, they have expressed all which they intended. *Harrell vs. Durrance*, 490.

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CHARGE OF COURT—

1. If the court assumes to charge the jury, it ought to charge on the whole law but if a party desires to avail himself of any failure or omission in this respect, he must call the particular point to the attention of the court, otherwise he will not be permitted to assign the omission for error. *Cato, a slave, vs. The State*. 163.
2. The charge of the court should be confined to matters in issue. The court is not bound to instruct the jury at defendant's request. "That if H. had killed W., and the homicide would have been manslaughter and not murder, that they ought not to find him guilty of an assault with intent to kill." *Hall vs. the State*, 203.
3. It is not error for the court to refuse an instruction not applicable to the issue joined or the evidence in the case. *Judge vs. Moore*, 269.
4. The Supreme Court will always reverse a judgment in a criminal case where it shall appear that the Judge charged the jury upon the case but did not reduce his charge to writing, and file it in the case, according to the 8th section of the act of January 4, 1848.
5. The record stated that the prisoner was led into court by the Sheriff, "whereupon came a jury, &c., who being duly chosen, tried and sworn, after hearing the evidence and argument of counsel, *and under charge of the court, retired* to consult of their verdict," &c. : Held that this language does not furnish evidence that the judge charged the jury within the meaning of the above act.
6. Remarks by the Judge to the jury touching their behavior on retiring to consult of their verdict, as that they shall not speak to any one or suffer any one to speak to them do not constitute a charge within the meaning of said act. *Duggan vs. The State*, 516.

CHANCERY—

1. After a defendant has answered a bill in Chancery and submitted himself to the jurisdiction of the Court without objection, it is too late to insist the complainant has a perfect remedy at law, unless the Court of Chancery is wholly incompetent to grant the relief sought in the bill.
2. A Court of Equity will entertain a bill of *quia timet* in proper case filed for the purpose of enforcing a specific performance and preventing a possible future injury, thereby quieting men's minds and estates, &c.
3. Equity may decree the performance of a general *covenant of indemnity*, though it sounds only in damages.

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4. Chancery may order an instrument to be delivered up to be cancelled when it is void from matter appearing from proof taken in the cause, and will cancel agreements founded in fraud, imposition and misrepresentation. *Griffin vs. Orman*, 22.
5. There is no rule defining definitely what *lapse of time* will bar a purely *equitable* demand. Each case must depend upon its own circumstances. *Amos vs. Campbell*, 187.
6. In this State, all decrees in chancery, whether interlocutory or final, are not only by the practice of our courts, but by statutory provision, deemed to be enrolled when entered upon the minutes of the court.
7. A decree directing a reference to a master for the purpose of ascertaining any material fact in the case, is not a *final decree*, although it ascertains and determines all the equities of the case.
8. A bill of review lies only after final decree, and not upon an interlocutory decree. A bill in nature of bill of review, is not of use in this State, as all decrees are enrolled when entered upon the minutes of the court.
9. After an *interlocutory decree is enrolled*, the court will grant leave to file a supplemental bill, to bring forward newly discovered evidence, and grant a rehearing upon the same if the evidence is of such a nature, as were it a bill of review, would entitle the party to relief.
10. To entitle the party to relief in such cases, the newly discovered evidence must be *relevant* and material, and such as might *probably* have produced a different determination. The new matter must have first come to the knowledge of the party after the decree. The matter must not only be new, but it must be such as the party, by the use of *reasonable diligence*, could not have known; it must not be merely *cumulative*, nor merely corroborative or *auxiliary* to what is already in the case, but must establish a *new fact of itself*, decisive of the merits of the cause.
11. With administrators who are strangers to the transaction, and who have to look after evidence to defend the estate, the same stringency in ruling as to knowledge of facts, ought not to be exercised.
12. On application for leave to file an supplemental bill, and for a rehearing, the Appellate Court can only consider the *prior* interlocutory decree, so far as to ascertain and enquire whether the new matter sought to be introduced is relevant and material, and such as had the same been before

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the Chancellor , might probably have produced a different determination. Owens vs. Administrator of Wm. Forbes, deceased, 325.

13. Where the face of a bill in chancery shows a case barred by the statute of limitations, and no circumstances are stated which take the case out of the operation of the act, advantage of it may be taken on a motion for an injunction.

14. In order to arrest by injunction claims established by a decree of a Court of Chancery, it must be shown that the applicant has a prior right which he has not lost by laches. City of Apalachicola vs. the Apalachicola Land Co. 341.

15. Relief will be granted in equity against a judgment at law when the defence could not *at the time, or under the circumstances*, be made available at law, *without any laches of the party*.

16. So, if a fact material to the merits *should be discovered after a trial*, which could not *by ordinary diligence* have been discovered before, the like relief will be granted. Baltzell & Chapman vs. Randolph, 366.

17. To authorize the Chancellor to retain a bill in order that he may give *general* relief, where the *special* relief sought has been denied, it is necessary that he shall have *acquired cognizance* or *gained jurisdiction* of the cause.

18. The opinion of the Chancellor, delivered in the court below, forms no part of the record of the case, and cannot be read or referred to in the Supreme Court. McLeod vs. Dell, 427.

CIRCUIT JUDGE—

1. The Circuit Judge must be presumed to have done his duty in the absence of proof to the contrary. Duggan vs. The State, 517.

CONTINUANCE—

1. Where a party applies in a civil suit for a continuance for *the term* on the ground of the absence of a witness, it must be shown by affidavit that the witness has been duly served with a subpoena, or a satisfactory reason assigned for the omission ; that he is absent without the consent of the party, directly or indirectly given ; that he resides in the county where the suit is pending, or if out of the county, good cause must be shown for not taking his deposition ; that the testimony is material ; that the applicant expects to procure said testimony at the next term ; that the application is not made for delay only ; that he cannot safely proceed to trial without the evidence of said witness ; and the party must further state the facts expected to be proved by said witness.

2. It is not error for the court to refuse to allow a motion for the continuance

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of the cause, where the affidavit in support of it does not come up to the above rule. *Harrell vs. Durrance*, 490.

CRIMES—

1. The common law of England in relation to crimes is adopted and declared to be in full force in this State, excepting only so far as the same relates to the modes and degree of punishment. *Ammons vs. The State*, 531.

DAMAGES—

1. The Circuit Court, on a motion for a new trial on the ground the jury have given excessive damages, should look into the evidence and see whether the damages are excessive, and if so, either grant a new trial, or grant a new trial unless within a time to be fixed by them, the plaintiff remit so much as shall reduce them to the true sum. *Harrell vs. Durrance*, 490.

DECREE—

(See *Chancery*,) 325.

DEED—

1. A deed will take effect only from the date of the *delivery*, actual or constructive. See *Escrow*, 60.

DECLARATION—

1. A party need not set forth the very words of a note in the declaration; he may, if he chooses, set forth what he considers the substance and legal effect of the note in this respect, and where he professes to give the legal effect and operation of the instrument declared on, and he does not make the legal effect, there is no variance. *Harrell vs. Durrance*, 490.

DELIVERY—

(See *Donatio Causa Mortis*,) 359.

DEPOSITIONS—

1. It is not error in the Circuit Court to refuse to order a plaintiff to read on the trial depositions taken by him, though said depositions are on file and have been opened.
2. The *defendant* may read such depositions as testimony on his own behalf, if he desires it. *Broughton vs. Crosby*, 254.

DESCENT—

1. By the rules of descent in Florida, *real estate* descends, where there are no children nor their descendants, to the father, *excepting* in cases where husband is heir of his wife. *McGee et als vs. Doe ex dem. Alba*, 382.

DISTRIBUTE—

1. Under the policy of the several statutes regulating the administration of estates, the rights of *creditors* and *distributees* stand upon a different footing. While the statute of *non-claim* will operate as an absolute *bar* to the former, it will not prevent a recovery by the latter. *Amos vs. Campbell*, 188.

DONATIO CAUSA MORTIS—

1. Delivery of the thing donated is essential to the perfection of the gift, whether it be made *inter vivos* or *causa mortis*.
2. To determine the sufficiency of a delivery, reference must be had as well to the nature of the property as to its locality.

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3. Acts which would be insufficient to constitute a good delivery of inanimate or, unintelligent property, might, under the accompanying circumstances, be deemed altogether sufficient to perfect the delivery of a slave possessed of understanding and volition.

4. Where a female slave is in the chamber of her master, who is lying *in extremis* and he directs a deed to be drawn up, giving her and her children to a person present at the time, this is a good delivery *causa mortis* of the mother and her children, though the children were absent from the chamber at the time of the gift.

5. And the fact that the mother and children continued to remain at the residence of their former master for a short time after his decease, which occurred within a few hours after the execution of the deed, did not operate to defeat the gift. *Powell vs. Leonard*, 359.

DORMANT PARTNER—

1. If a dormant partner shares in the profits of a business, he is liable at law for all contracts within the legitimate sphere of that business, by and with the firm. *Griffin vs. Orman*, 22.

EJECTMENT—

1. A judgment in ejectment is conclusive against the defendant for all profits which have accrued since the date of the demise, stated in the declaration in ejectment, but if the plaintiff sues for any *antecedent profits*, the defendant may make a new defence.

2. The right to mesne profits is a necessary consequence of a recovery in ejectment, and the recovery in ejectment by an incorporated town of an easement which is a real franchise holden by the town under provisions of her charter for the benefit of all the citizens, is no exception as to the right to mesne profits during the occupancy of their property.

3. A plaintiff in ejectment cannot, after recovery, turn this action at law for mesne profits into a suit in equity, and bring a bill for an account of the profits, except in the case of an infant or some other very particular circumstances. The "particular circumstances" excepted in laying down this rule, extend to all cases which involve an equity which the plaintiff cannot make available at law.

4. A suit in Chancery lies for an account of mesne profits after a recovery in ejectment, if the bill shows a right to discovery and relief in a matter incident

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thereto, and the court having jurisdiction for one purpose may finally settle the whole merits of the cause. *City of Apalachicola vs. Apalachicola Land Co.*, 340.

5. The rule that a plaintiff in ejectment must rely upon the strength of his own title, and not upon the weakness of his adversary's title, is not to be understood as requiring that he shall be compelled, in the first instance, to trace his title back to the original grantor; but only that he shall exhibit so much as will put the defendant to the support of his possession, by a title superior to one of a mere naked possession.
6. A plaintiff in ejectment is required, in the first instance, only to show a legal title, and a right of entry under it, in order to drive the defendant to an exhibition of a paramount title. *Hartley vs. Ferrell*, 374.

EQUITY—

(See Chancery.)

ESCROW—

1. Where a deed of mortgage was delivered to a third person, to be kept by him during the pleasure of the mortgagor, and subject to his further orders: Held, that it was an *Escrow*, and that the third person was a mere depository.
2. It is essential to the character of an Escrow that it be delivered to a third person, to be delivered to the obligee or grantee upon the happening of some event or the performance of some condition by him.
3. It is not a universal, or even a general rule, that the doctrine of relation attaches to instruments of this character. It is only allowed in cases of necessity, to avoid injury to the operation of the deed, from events happening between the first and second delivery. *Lobat vs. Kipp & Young*, 60.

EVIDENCE—

(See Parol Evidence.)

1. Where notice under the statute (Thom. Dig., 343, § 1,) is given to the adverse party in a suit to produce books or papers, the regular time to call for the production is not until the party who requires them has entered upon his case before the jury, until which time the other party may refuse to respond to the notice.
2. Before the court will proceed to give judgment against a party failing or refusing to produce the book or paper demanded, it must be satisfied that the book or paper is in the possession or under the control of the party and that it is material to the issue.
3. Where the book or paper demanded is only a link in the evidence, the party

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giving the notice must show its materiality by the prior introduction of other testimony. *Sinclair vs. Gray*, 71.

4. Counsel have the right to embody in their motions to quash or in arrest, what statements they please, but no court can regard such statements as evidence.
5. The proper way to get facts before an appellate court in such form as to render them evidence, is to make a statement of them in the shape of a bill of exceptions, and then get the Circuit Judge to sign and seal it and order it to be made a part of the record. *Broward vs. The State*, 422.
6. Where in a criminal case there is conflicting evidence, and attempt made on the trial of the cause to impeach a witness, which failed, the jury giving credit to the testimony of the witness, this court will not review their action. *Ammons vs. The State*, 530.

GANANCIAL RIGHTS—

1. The ganancial rights and privileges of husband and wife, as to property acquired during coverture, under the Spanish law in force in Florida at the exchange of Flags, have been secured, and will be acknowledged in our courts.
2. Those rights and privileges declared. *McGee et als. vs. Doe ex dem. Alba*, 382.

GARNISHEE—

(See Attachment,) 160.

GRAND JURY—

1. The grand jury must consist of men possessing the qualifications prescribed by statute, and one incompetent Grand Juror will render an indictment void and of no effect: *Provided* exception thereto is taken before issue joined and trial on said indictment.
2. If a qualified or incompetent person is returned upon the Grand Jury, he may be challenged by the prisoner before the bill is presented; or after the finding the defendant may plead it in avoidance.
3. Under the provisions of the statute of this State, a person over sixty years of age is not a competent Grand Juror.
4. Where a Grand Juror is asked by the court, in common with all the persons drawn as Grand Jurors, whether he is over sixty years of age, and remains silent and takes the oath of Grand Juror, it is an acknowledgment he is under sixty years of age, and he will be so considered until the contrary is clearly established by evidence. *Craven Kitrol, Plaintiff in Error, vs. The State*, 9.

GUARDIAN—

1. A father can appoint a guardian for his children during any part of the infancy of the child, "by deed in writing or last will and testament," as pre-

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scribed by the act of 1828, (Thomp. Digest, 225,) but such appointment only gives "power over the child," and not over the property of the minor.

2. Under the statute of 12 Charles 2d c. 26, sections 8 and 9, fathers were authorized to appoint guardians for their children, who should have power over the person of the child, and the custody and management of the estate of the minor; but our statute of 1828, is inconsistent with the statute of Charles, and restrains the custody, care and management of the guardian appointed by deed or will to the person of the child.

3. A person appointed guardian by deed or will of the father, may be guardian both of the person and estate of the minor, but as guardian of the person, he derives his appointment from the father, and of the property by authority from the court authorized to grant it.

4. An infant may, by his *prochein ami*, call his guardian to an account.

5. A Court of Chancery will permit a stranger to come in and complain of the guardian, and abuse of the infant's estate.

6. The statute authorizing the father to appoint a guardian of his child, does not contemplate their giving a bond.

7. If a person appointed guardian, pursuant to our statute, abuses the trust, by doing anything prejudicial either to the person of the infant or his estate, the Court of Chancery, where the Probate Court refuses or neglects so to do, may, upon proper application, either remove him and appoint another guardian, or else impose such terms on him, by obliging him to give security, &c., as will effectually hinder him from doing anything prejudicial to the infant. *Thomas et al. vs. Williams and Wife*, 289.

INDICTMENT—

1. As a general rule when an indictment is defective on demurrer, advantage may also be taken of the defect on motion in arrest of judgment. *Murray a Slave vs. The State*, 246.

2. Where all the counts in the indictment are good, and the jury return a general verdict of guilty, it is the true practice of the court, if the evidence and law warrants the conviction, to pass judgment on the count charging the highest grade of offence. But where the grades of offence in each count are equal, and there are good and bad counts in the indictment, the practice is to pass judgment on all the good counts, provided the conviction is warranted by the law and evidence applicable to the offence charged in that count. *Cribb vs. The State*, 409.

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3. An indictment will not be quashed except for something appearing in the indictment itself. *Broward vs. The State*, 422.

4. An indictment under the act in relation to trading with slaves, approved January 24, 1851, which charges the defendant with buying and receiving grain from a slave, "*whose name is to jurors unknown*," but avers the name of the owner of the slave and charges the offence to have been committed on a *day certain*; held sufficient, without giving the name of the slave. *Harrison vs. The State*, 156.

INJUNCTION—

1. On the application for an injunction, a Chancellor may go into the consideration of the merits as disclosed in the bill, and which are intrinsic and dependent upon its express allegations and charges.

2. On a motion for an injunction, the court will not commit itself to points or questions that may arise at the final hearing.

JUDGMENT—

1. Relief will be granted in equity against a judgment at law when the defence could not at the time, or under the circumstances, be made available at law, without any laches of the party.

2. So if a fact material to the merits should be discovered after a trial, which could not, by ordinary diligence, have been discovered before, the like relief will be granted. *Baltzell & Chapman vs. Randolph*, 366.

JURY—

(See Grand Jury.)

1. It is not indispensable that the jury, in a capital case, should be committed to the charge of a bailiff specially sworn for the occasion. It is sufficient if they be put in charge of the Sheriff, or his deputy, who has taken the oath of office.

2. The "bill of exceptions" is a privilege accorded to a party to cause that to be made a *matter of record* which would not otherwise appear in the history of the trial; he must therefore incorporate in his bill whatever *fact* he may desire to rely upon as a matter of error. Unless so incorporated, the Supreme Court will not assume its existence, nor will it be induced to enter the field of mere conjecture. *Cato a slave vs. The State*, 163.

3. A venire man stated on his *voir dire* that he had formed an opinion as to the guilt or innocence of the prisoner, but that such opinion was based on mere rumor; that he had not heard the witnesses or any one speak of the matter by detailing any of the facts or circumstances connected with the killing as of their own knowledge; that it would require evidence to remove the opinion

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so formed upon rumor, but that if taken upon the jury, he could readily and without hesitation find a verdict according to the evidence, although that verdict might be contrary to the opinion so formed on rumor. *Held*, that said juror was competent.

4. A *venire* man stated on his *voir dire*, that "he, as Coroner of the county, held the inquest on the body of the person for whose killing the prisoner is on trial; that he heard all the evidence that was then before him, but that he had not formed or expressed an opinion as to the guilt or innocence of the prisoner at the bar." The record did not show what evidence was "then before him," or that there was any whatever pointing to the prisoner as the person who had committed the killing. *Held*, that said *venire* man was competent to be sworn in chief as a juror.
5. A *venire* man stated on his *voir dire* that he is related by blood to the prisoner; thinks he is not so near related as second cousin, but that he may be third cousin: *Held*, that he was not competent to be sworn as a juror.
6. "There is no provision whatever in our law for issuing a special *venire facias*." "When by reason of challenges or otherwise a sufficient number of jurors duly drawn and summoned cannot be obtained for the trial of any cause, civil or criminal, or for the execution of a writ of enquiry, the court shall cause jurors to be summoned from the bystanders, or from the county at large, to complete the panel." These jurors need not be regularly drawn from the box, like the members of the regular panel, but they must have the same qualifications as those presented for the regular panel, that is to say, they must be free white male citizens of the United States, who are householders and inhabitants and residents of the State and county, above twenty-one years and under sixty years of age. In practice it is not error for the court to anticipate that the regular panel will be exhausted, and therefore in advance to order the Sheriff to summon any reasonable number of competent jurors to be present, so that they may be in readiness to be taken on the happening of the anticipated contingency.
7. The prisoner demanded that each juror, as he was tendered by the State and accepted by him, should be sworn in chief, which the court overruled, and each juror as he was tendered and accepted, was ordered into the box and kept under the eye of the court until the whole twelve were chosen, and thereupon the court ordered them to be sworn in chief, three at a time. *Held*, that this was not error. It is not error for the court to refuse to cause

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the jurors to be tendered to the prisoner again separately after he has once accepted them, but it is the right of the prisoner to retract his acceptance and object to a juror at any time before he is sworn in chief.

8. It is not error for the court to refuse to have the jury sworn "to find a verdict according to the law as well as the evidence in the case." The usual and proper form of oath is this "You shall well and truly try and true deliverance make between the State of Florida and ———, the prisoner at the bar, whom you shall have in charge and a true verdict give *according to the evidence.*"

9. The verdict of the jury must be recorded before they are discharged. The jury having returned into court and having answered to their names, the court asked them if they had agreed on their verdict; they answered they had, and handed the court the indictment, on the back of which was written: "We, the jury, find the prisoner guilty. CHARLES PRATT, Foreman." The court then said, "do you all say that the prisoner is guilty?" to which the jury assented; thereupon, on motion of the prisoner, the jury was polled, and each juror answered guilty. Thereupon the court discharged the jury. Held, that this verdict was recorded within the meaning of the law. *O'Connor vs. The State*, 215.

LIMITATIONS, STATUTE OF—

1. Section 11 of our Limitation Act, November 10, 1828, has no reference to defendants who reside out of the State of Florida, when the cause of action accrued. *Haviland, Clark & Co. vs. R. B. Hargis*, 15.

"MARRIED WOMAN'S LAW"—

1. The fourth section of the Act of 1845, known as the "Married Woman's Law," is not in conflict with the proviso contained in the Act of 1835, which requires the private examination of the wife, when about to convey her separate real estate; and to be valid against her, the deed must be executed conformably to the requirements of that proviso.

2. Where in such case there was a private examination, but the written acknowledgment of the execution of the deed stated that it was done with "the intent of relinquishing her *right of dower*," these words will be rejected as surplusage, and the deed be held to be properly executed. *Hartley vs. Ferrell*, 374.

MASTER'S REPORT—

1. As a general rule, wherever exceptions will lie to the Master's report, it must be regularly confirmed before any order can be made upon it.

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2. A decree directing a reference to a Master, for the purpose of ascertaining *any material fact* in the case, is not a *final* decree. Griffin vs. Ormand, 22.

NATURALIZATION—

1. Under the naturalization act of Congress of 1802, the infant children of aliens, though born out of the United States, if dwelling within the United States at the time of the naturalization of their parents, become citizens by such naturalization, and the provisions of that act on this subject are prospective, so as to embrace the children of aliens naturalized after the passage of the act as well as the children of those who were naturalized. O'Connor vs. The State, 217.

NEW TRIAL—

1. It is not error to refuse a new trial for the purpose of enabling a party to procure testimony to impeach a witness. Judge vs. Moore, 260.

NOTE—

(See Promissory Note.)

1. An Executor or Administrator under the proviso of the 24th section of the Act regulating judicial proceedings, approved Nov. 23, 1828, may deny the signature of his testator or intestate to any bond, note, or other instrument purporting to have been signed by him, and also plead a failure or want of consideration by plea put in without being sworn to, and after the cause is called on the appearance docket, on giving reasonable notice, and the effect of such plea will be the same as at common law, that is, to require the plaintiff to prove the signature and the defendant to prove the want or failure of consideration.
2. If the Executor or Administrator desires to throw the onus of proving the consideration on the plaintiff, he must put in his pleas under oath, before the cause is called on the appearance docket. Knight vs. Knight, 283.

NOTICE—

1. There is no particular form necessary for the notice directed to be given in the statute of non-claim. It should, however, be so full and ample in its terms as to make it a warning to those having demands against the estate. Amos vs. Campbell, 189.
2. In an action by a Railroad Company against one of its Stockholders to recover the amount of certain assessments or calls upon his shares of stock, notice of such assessments or calls must be averred in the declaration and proved at the trial.
3. A notice published in a newspaper, calling upon the Stockholders generally to pay up such calls, is not sufficient proof of notice, unless it be so provided by the charter or by-laws of the Company. Alabama & Florida Railway Co. vs. Rowley, 508.

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PAROL EVIDENCE—

1. The rule of law briefly expressed is, that “parol contemporaneous evidence is inadmissible to contradict, or vary the terms of a valid written instrument” Under this rule, all oral testimony of a previous colloquium between the parties, or of conversation or declarations at the time when it was completed or afterwards, is rejected.
2. Parol evidence is sometimes admissible where the language of the instrument is applicable to several persons, to several species of goods and cat-tels, &c., or the terms be vague and general, &c. *Harrell vs. Durrance*, 490.

PARTNERSHIP—

1. If a dormant partner shares in the profits of a business, he is liable at law for all contracts, within the legitimate sphere of that business, by and with the firm.
2. A suit and judgment recovered against two of a firm is not a judgment against a third member not named in the pleadings.
3. Creditors cannot get relief in a Court of Equity until they have judgment at law and return of *nulla bona*, or what is equivalent thereto, in the *ft. fa*.
4. Creditors of a partnership have no lien upon the goods sold after a *delivery* thereof, and on suits by them they execute their judgment against the effects of the partnership and any other effects of the individual members parties to said suit—until then they cannot prevent the partners from *bona fide* selling and transferring the same even to one another.
5. As a general principle, each partner of a firm has a specific lien on the partnership stock, not only for the amount of his share, but for moneys advanced by him beyond that amount for the use of the co-partnership, and that this lien extends to property purchased with the partnership funds as well as that standing in the partnership name; but where they *bona fide* sell and transfer the property to one of the firm, with intention that the effects assigned and sold are to be appropriated to the private use of the purchasing partner, then this lien is lost and the property ceases to be partnership property. *Griffin vs. Orman*, 22.

PENSACOLA & GEORGIA R. R. CO.—

1. The acceptance by the Pensacola & Georgia Railroad Company of the provisions of the act of January, 1855, to provide for and encourage a liberal system of internal improvements in this State, did not materially alter or change the original charter of said Railroad Company.
2. Nor did such acceptance materially enlarge or diminish the power con-

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ferred by the original charter upon the board of directors of said company to locate the route and fix the terminal points of the road.

3. The power conferred by the original charter upon the board of directors to locate the road and to fix the terminus thereof on the boundary line between the States of Florida and Georgia, is not infringed by the act of 15th December, 1855, amendatory of the original act of incorporation of the Pensacola & Georgia Railroad. *Calvin J. Johnson vs. Pensacola & Georgia R. R. Co.*

PERSONAL PROPERTY—

1. A transfer of personal property, including choses in action, rights and credits, valid where made, will be recognized by our courts, provided it be not contrary to good morals nor repugnant to the policy and positive institutions of the State.
2. There are no laws in Florida prohibiting a citizen of another State from a free disposal of his personal property, situated here, for honest purposes and without fraud. *Walters & Walker vs. Whitlock*, 86.

PERPETUITIES—

1. A recognition of the rule respecting "perpetuities," to-wit: "a life or lives in being, and twenty-one years after," is not in conflict with the 24th clause of our "declaration of rights." *McLeod vs. Dell*, 427.

PILOTAGE—

1. The second section of the act of 1859, entitled "An Act to be entitled an act to amend an act to regulate Pilotage at the port of Fernandina, in the County of Nassau and the port of Cedar Key, County of Levy," was not in violation of the constitution of the United States, nor of any law nor treaty made in pursuance or under the authority of the constitution.
2. The holding of a license to pilot, by a resident of this State, from the authorities of the State of Georgia, is a statutory offence, and not an offence known to the common law: therefore as no penalty is prescribed in the act creating said offence, the remedy is not by indictment.
3. The laws of the several States for the regulation of pilots "are enacted by virtue of a power residing in the States to legislate," and are valid, unless such legislation interfere with, or is contrary to an act of Congress, passed in pursuance of the constitution. *Cribb vs. The State*, 409.

PLEADING—

1. Where the defendant fails to tender a defence to any particular count of the declaration, the plaintiff is entitled to a judgment upon that particular count as for a default; but such judgment must be given by the court—it is not the subject of instruction to the jury.

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2. It is a settled principle that none but a party holding the legal title to an instrument can maintain an action upon it in a common law court; and to obtain a recovery upon the same, he must establish such title by competent evidence. *Sinclair vs. Gray*, 71.
3. When a demurrer to plea is sustained, with leave to defendant to plead over and he does plead over, he cannot assign the sustaining of the demurrer as error.
4. It is the duty of parties before they go into trial to see that the pleadings are made up, and when they go willingly before the jury, they must, unless the contrary plainly appears, be considered as having waived all demurrers undisposed of, and all pleas, replications, &c., on which the issues are not joined. *Judge vs. Moore*, 269.
5. In suits brought in the name of A. for the use of B. the nominal plaintiff is A; the real plaintiff is the person for whose use it is instituted.
6. The assignee can only bring suit in the name of the nominal plaintiff, where there is a legal assignment of the right of action, and by such assignment a right to use the name of the assignor. Where in such suits the declaration does not disclose a legal assignment in the real plaintiff, of the right of action it will be held bad on demurrer thereto. *Kendig vs. Giles*, 278.
7. It is an admitted rule of pleading that where the matter alleged in the pleading is to be considered as lying more properly in the knowledge of the plaintiff than of the defendant, in that case the declaration ought to state that the defendant had notice of the same.
8. And where a special averment of notice is necessary, the averment must be proved. *Alabama & Fla. R. R. Co., vs. Rowley*, 508.
9. Where the pleadings are in such a defective condition as to make it manifest that the jury who tried the cause could not have had an intelligent apprehension of the issues to be tried, the judgment will be reversed, and the cause remanded for a new trial. *Pearce & Son vs. Jordan*, 526.

PROMISSORY NOTE—

1. Where the promise is to pay interest from day, in a promissory note, it draws interest from the date thereof, and an averment "with interest from date," gives the true legal effect and operation of the instrument. *Harrell vs. Durrance*, 490.

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PUBLIC LANDS—

1. An indictment will lie against a trespasser on the public lands of the state of Florida under the act of January 13th, 1849. *Broward vs. The State*, 422.

RECORD—

1. The record being in *feri* and under the control of the court during the entire term, its completion at any time before the final judgment relates back and heals previous informalities. *Ammons vs. The State*, 530.

RAPE—

1. Where a slave is indicted for the crime of rape, he cannot be convicted of a simple *assault*, the Circuit court having no jurisdiction of that offence when committed by a *negro or mulatto*. Whether such conviction can be had in the case of a white man—*quaere?*
2. On a trial for the crime of rape, it is not sufficient to charge the jury that “if a man have carnal knowledge of a woman *against her will*, he may be convicted.” The charge should be “*forcibly and against her will.*”
3. Although in a strictly *legal* point of view, *force* may be implied from a *want of consent*, yet in common parlance such identity does not exist, and jurors ought to receive their instructions on the law in language that they can understand. *Cato, a Slave, vs. The State*, 163.

SHERIFF—

1. Where a *Rule Nisi* was taken against a Sheriff, calling upon him to show cause why he should not be compelled to pay over the amount of an execution in his hands, if it shall be made to appear that he had not made the money thereon, the court has no authority to give summary relief in the premises, by ordering him to pay the money or to stand committed.
2. The plaintiff in an execution has a right to require the same to be returned into office at any time, and for a *false return* his only remedy against the officer is by *action*.
3. Where the money on an execution is shown to have been collected, the plaintiff in execution is entitled, under the provision of the 7th section of the act of 1833, to proceed *summarily* against the officer, by *motion* to the court. *McLeod vs. Ward, Close & Co.*, 18.

SHERIFF'S SALE—

1. A purchaser at a Sheriff's sale has only to show his deed, the execution under which the land was sold, and prove title in the defendant in execution, or possession since the rendition of the judgment; and the *onus probandi* is cast on the opposite party. *Hartley vs. Ferrell*, 374.

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SLAVES—

1. The general system of legislation in this State has been to keep up a distinction between the punishments to be inflicted on white persons and slaves for the same violation of the criminal law, and also to keep up the distinction in statutory offences. White men and slaves will not be considered subjects of a common statute, unless clearly manifested.
2. If, from a view of the whole statute, together with the history of our legislation, the intention of the legislature to include slaves is manifest, they will be considered as included and held responsible in the word "person."
3. The Legislature of this State did not include *slaves* in the first and second sections of the act of 27th February, 1839, making it a statutory offence for any *person* to keep a gaming table, and prohibiting betting and playing at such table. *Murray, a Slave, vs. the State*, 246.
4. The 8th section of the act of 5th February, 1824, was repealed as to East Florida, with the exception of the county of Columbia, by the act of the 14th February, 1835. *Donaldson vs. The State*, 403.

STATE SOVEREIGNTY—

1. A State being sovereign and independent, possesses inherent right and power over her resident citizens. Under this power she had a right to declare what is a public grievance, providing such declaration does not conflict with the constitution or of any act of Congress passed within the scope of the constitutional power of Congress;) and prohibit one of her citizens residing within her jurisdiction (while he does thus reside,) from holding and exercising a license or office from a sister State or any foreign power. *Cribb vs. The State*, 409.

STOCK RAILWAY—

1. The principle of law which will not allow the terms of a written contract to be varied by parol evidence, is as applicable to subscription for railway stock as to any other written contract. *Johnson vs. Pen. & Ga. R. R. Co.*, 299.

SUBROGATION—

1. The equitable doctrine of subrogation or substitution to the place of the creditor without any agreement, is applicable in cases where the person advancing money to pay the debt of a third party stands in the situation of a SURETY, or is compelled to pay it to protect his own rights. *Griffin vs. Orman*, 23.

SUPREME COURT.

1. It is within the province of the Supreme Court, upon appeal or writ of error, to look beyond the bill of exceptions and to consider errors apparent upon the face of the record; but to induce the court to reverse a judgment for an

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error not embraced in the bill of exceptions, or not properly assigned requires a strong case, and one showing that it will be manifestly against right to permit the judgment to stand.

2. The act of 1852-'3 (Pamp. Laws, 100,) makes it the duty of the Supreme Court to review the rulings of the Circuit Court upon motions for new trials. *Bridier vs. Yulee*, 481.
3. Where the record fails to show that a final judgment had been entered in the court below, the appeal will be dismissed. *Watson vs. Savell*, 506.
4. The Supreme Court will not consent to sit as an arbitrator between the parties to a cause brought up by appeal or writ of error. *Pearce & Son vs. Jordan*, 526.

TREATY WITH SPAIN—

1. The 8th Article of the Treaty of February 22d, 1819, between the United States and Spain, by which the Floridas were acquired, must be construed to stipulate expressly for the security to private property, which the laws and usages of nations would, without express stipulation, have conferred.
2. The operation of the said treaty as a confirmation, is the same upon a purchase of land of the Spanish Government, before the date fixed in the treaty, as upon a grant made by the Spanish authorities previous to that time, which is to confirm such grant or purchase "*in present*," and the language of the Spanish side or Spanish copy of the treaty, is substantially adopted as the true reading, viz: that such grants "*shall stand or remain ratified and confirmed,*" &c.
3. Under the said treaty, it was not contemplated that the Government of the United States should convey titles upon purchases made of Spain before 24th January, 1818, but only that the United States after a change of dominion, should respect such purchases as were made of the Spanish government before that time, and ratify and confirm the right which had, before that time been acquired of the Spanish government.
4. The report and abstract or decision of the Board of Land Commissioners, appointed under the act of Congress, approved May 8th, 1822, entitled "An act for ascertaining claims and titles to lands within the Territory of Florida," in regard to claims and titles to lands in Florida, whether under grants from the Spanish government or by purchase from said government, are not final and cannot have the force of *res adjudicata*, nor deprive them of any right which they may have had previous to said report and abstract or

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decision. That the object for which these commissioners were appointed was to enable the government to ascertain the Spanish grants and sales, and their location, so that they might be separated from the public domain, and not sold as public lands. That for this purpose they "*constituted a board of inquiry, not a court exercising judicial power and deciding finally on titles.*" As to "Donation" claims—Quere?

5. It is inconsistent with all the acts of Congress and of our courts, in adjusting land titles derived from the Spanish Government in Florida, prior to the date fixed by the treaty, to construe said acts in confirmation as a grant *de novo*.
6. The act of Congress, approved March 3, 1839, entitled "An Act for the relief of the heirs and assignees of Peter Alba, deceased," (and made part of the special verdict in this case,) is confirmatory of the preexisting title of Peter Alba, Jr., ratifying and confirming the same, as by the treaty stipulation the government was bound to do; and by the "relinquishment of any title which the United States may have to said lots," in said act, Congress but authorizes the separation of the land from the public domain, in order that they may not be sold as public lands and therefore is not, to any intents and purposes, a grant *de novo*. McGee et als. vs. Doe ex dem. Alba., 382.

TRUST. —

1. A *trust*, in its strict and technical sense, is known only in equity, and so long as it subsists it cannot be reached, as between trustee and *cestui que trust*, by the statute of limitations.
2. To exempt a trust from the bar of the statute, it must be, first, a direct trust; second, it must be of a kind belonging exclusively to the jurisdiction of a Court of Equity, and, third, the question must arise between the trustee and the *cestui que trust*.
3. Property devised in trust after payment of debts, is assets in the hands of an administrator, with the will annexed, for which the sureties on his bond are liable.
4. The Trustee cannot get possession of such property, except through the administrator, and therefore may sue him and his sureties for it; and such suit may be brought without any order having been made by the Judge of Probate. Woodfin et als. vs. McNeal et al., 256.
5. B, without any writing whatever, but verbally and by word of mouth only, assigned, transferred and delivered to three of his creditors, constituting the firm of C. M. & Co., a package containing notes, drafts, &c., for near \$30,-

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000, *in trust*, to collect and distribute the proceeds, as far as they would go, *pro rata*, between the assignees and his other "Charleston creditors," making no conditions or reservations in his own favor: Held, that this assignment was valid and irrevocable from the time of its acceptance by the assignees; that the privity or consent of the creditors was not necessary; that such assent will be presumed until the contrary appears. *Matilda Brown vs. Chamberlain, Milor & Co.*, 364.

VENIRE—

(See Jury,) 216.

VENUE—

1. Upon a change of venue in a criminal case, the transmission of the copy of proceedings, including the order for change of venue, accompanied with the original indictment and other necessary papers mentioned in the order (if any) of the court, *prima facie* satisfies the statute.
2. The making of the order changing the venue in such a case and adjourning the court without revoking it, vested, *eo instanti*, jurisdiction in the Circuit Court of the county to which the cause is forwarded. The jurisdiction cannot be in abeyance.
3. In all criminal cases, whether upon a change of venue or otherwise, the trial should be upon the original indictment, unless by some express act the court is authorized to use a copy thereof.
4. When the venue in a criminal case has been changed, the prisoner may raise the question of the sufficiency of the transcript from the court in which the indictment was found, and may require the production of all necessary papers not sent forward, and should not be forced to trial without them.
5. If a prisoner go to trial in such a case on an imperfect transcript, without objection, he waives all right to object in arrest, of judgment. *Ammons vs. The State*, 530.

VERDICT—

1. When the verdict was simply "guilty," and there was but one count in the indictment, and that was for murder, although the jury under this count might have found the prisoner guilty of manslaughter, yet having found him guilty generally, it must be taken as referring to the offence in the indictment.
2. If the evidence in a case be so conclusive that the jury could not have found any other verdict than that which they did find, the court should not set aside such verdict on the ground of irregularity in the conduct of one or more of the jurors, unless such irregularity be gross. *O'Connor vs. the State*, 216.

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3. A verdict will not be set aside as against evidence, where there has been evidence on both sides, and no rule of law violated, nor manifest injustice done although there may appear to have been a PREPONDERANCE of evidence against the verdict.
4. As a *general rule*, if the finding of the jury be clearly against law, the verdict will be set aside and a new trial granted. *Gaines vs. Forcheimer & Brothers*, 265.
5. By making an act of Congress part of a special verdict of a jury (particularly where no objection to its admissibility in evidence appears in the record) the court will consider that the jury found all the facts stated and set forth in said act, whether the same were stated by way of inducement or otherwise. *McGee et als. vs. Doe ex dem. Alba*, 382.
6. Where the record shows that there was a total absence of evidence to support the verdict, the Supreme Court will not hesitate to set the verdict aside; but where there is *conflicting* evidence, the preponderance against the propriety of the verdict must be very strong to induce the court to interfere. *Bridler vs. Yulee*, 481.

WARRANTY—

1. A right of action on a warranty of soundness contained in a bill of sale of a slave (said warranty not containing a promise to the assigns or order of the purchaser or to bearer,) is not negotiable by assignment either at common law by the statute of Ann, or by the act of the Legislature of this State, so as to vest in the assignee a right of action on the warranty, in a suit at common law. *Kendrick vs. Giles*, 278.

WILLS—

1. J. R. devised to his wife, during her natural life, certain real and personal estate, remainder over to his children, J. W. R., M. E. and M. B.; also to his three children, J. W. R., M. E. and M. B., *and the heirs of their body* separate legacies of personal property; also to his grand-daughter M. J., who is a daughter of a *deceased son*, certain personal property, to be held in trust for her, but if she should die without any child or children living at the time of her death, then to belong to his *three* children, J. W. R. M. E. and M. B., share and share alike; also to his stepson, E. L. M. A., he gives certain personal property, after the death of his widow, and if the said step-son should die *without heirs of the body*, to the said M. E. and M. B., and by a subsequent item of the will declares: "*It is my will, that in the event of the death of J. W. R., M. E. or M. B., without heirs of their body of the ONE so dying, that his or her property be equally DIVIDED between the SURVIVORS,*" M. B. died unmarried and without children: *Held* that from the superadded

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words and expressions and circumstances contained in the context of the will, it was the *intention* of testator to fix the period of failure of issue of said M.B. *at the time of her death* without child or children living ; that the words "heirs of the body" and "without heirs of the body" are to be construed *children*, to carry out the intent of the testator, and that the limitation over to J. W. R., M. E. and M. B. was good by way of executory devise.

2. The intention of the testator is the polar star to guide in the construction of a will, which intention does not depend on any particular clause standing by itself, but is to be gathered from the whole will, taken together ; and where the testator's intention is manifest, it must prevail if it is not contrary to some positive or settled rule of law.
3. General words in one part of the will may be restrained in cases where it can be collected from any other part of the will that testator did not mean to use them in their general sense.
4. The rule in "Shelly's case" and the rule in executory devise, given, as defined. *Rusk vs. Rusk*, 105.
5. A devise of "*all the rest and residue of my property and estate, real and personal, and of every kind and description whatsoever*," embraces the corpus of the testator's property not otherwise disposed of.
Magee et als. vs. Doe ex dem. Alba., 38.
6. The rule which accords to the interpretation of words occurring in a will, greater indulgence than when used in a deed, must be taken with this qualification, that such indulgence is to be allowed only in aid of the intention of the testator : and where that intention is in *equipoise* between two contrary constructions, the words used, if they have received a well settled technical meaning, must be interpreted in that technical sense otherwise they are to be taken according to their common conception.
7. The words "child" or "children" occurring in a will usually denote immediate offspring, and in that sense are to be taken as words of *purchase* ; but employed as *nomen collectivum*, or synonymous with issue or descendants, they are to be taken as words of *limitation*, and are sufficient to create an estate tail. Where this latter construction has prevailed, however, it has generally been aided by the context.
8. The words "child" or "children" may be used as a term of *substitution*, that is, putting the immediate offspring in the place of the parent ; or it may be used as a term of *succession*. If employed in the former sense, it will not be

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taken to import "an indefinite failure of issue." McLeod vs. Dell, 427.

9. Neither land nor slaves will pass in this State by *nuncupative* will.

10. The 51st section of the act of 1828, on the subject of last wills and testaments, is to be taken to be restrictive in its operation, and intended to confine the testamentary disposition of both land and slaves, to wills in writing.

11. Where a testator by *nuncupative* will gives to his executor all of his estate, both real and personal, *in trust*, for the payment of debts, and the balance to be distributed to certain named legatees, if the devise and bequest of the land and slaves should fail, he will hold such of the chattel interests as do pass by the will subject to the payment of the debts of the estate, and not as a special legacy. McLeod vs. Dell, 451.

WITNESS—

1. Although a witness, incompetent through interest, be improperly permitted to testify at the trial, yet, if it appear from the record that the testimony of the witness is so abundantly corroborated and sustained by the testimony of other witnesses as to make it improbable that the jury were *misled* by the testimony of such witness, so as to cause them to make a finding which they would not otherwise have made, the verdict will not for that cause be disturbed. Bridier vs. Yulee, 481.

